

KEEPING PAY EQUAL



**Trade union side guide to local government
pay and grading reviews
2017 Edition**



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Introduction

This guide is intended for use by branches with members in organisations that provide local government-related services, including schools. It should be especially useful for union representatives who are new to local pay and grading reviews. It is in two parts – Part 1 covers negotiating issues and Part 2 legal issues.

The guide aims to demystify the process of grading and pay reviews and to explain the jargon. It takes you through the key ‘technical’ decisions to be made and the issues likely to arise in carrying out local grading and pay reviews. It sets out best practice and alerts union representatives to the main pitfalls. It is designed to be read in sections as you proceed through a review.

If you (or other union representatives in the branch) have not been involved previously in carrying out a local grading and pay review, it will also be helpful to read the predecessor to this guide – the *Trade Union Side Guide to Local Government Grading and Pay* (2005 edition).

For union representatives (including regional officials) who have negotiated over pay and grading reviews before, the guide gives technical and legal updates. There have been significant developments in law that impact on pay and grading. There are also new trends in human resource management (HRM) relating to employee reward.

In 1997, when the local government single status agreement came into being, most workers in scope of the new ‘Green Book’ – and subsequently, in Scotland, the ‘Red Book’ – were employed by local authorities. Spurred on by austerity, councils have been moving from traditional models of service delivery to newer models such as shared services, arms-length organisations, partnerships, local authority trading companies, mutuals and social enterprises. With outsourcing, new providers have moved into the local government sector. Since the late 1990s, the local government workforce has also changed – it has shrunk – although the use of casual workers has grown. Equal pay gaps have generally narrowed since 1997, however, in some regions we have actually seen a widening of the pay gap more recently. At the same time, low pay has increased across the whole of the local government sector. The impact of continuing austerity is being seen in local government organisations’ decisions about what services will be provided in future and how they will be provided. Clearly, these decisions will affect the size, make-up and development of the workforce and employee ‘reward’ (pay and benefits) as will the impact of the national living wage.

Having implemented single status, local authorities will vary in their enthusiasm to make further radical changes to pay and grading structures. Some employers will want to change local pay and

grading structures pro-actively to fit new service delivery models. Others will only make major changes to local pay and grading structures if the status quo is unsustainable. In both cases, affordability will obviously be a key concern.

Moves by local employers to alter current pay and grading structures could be sparked by internal factors such as organisational restructuring and/or external factors such as cuts and labour market pressures, as well as the pace and extent of devolution and the advent of ‘living wages’. In mid-2016, more than 200 NJC local authorities were voluntarily paying minimum rates reflecting the non-statutory Living Wage. Across the local government sector, the major impetus for changes to current pay and grading structures will be the implementation of the National Living Wage (NLW) increases.

Allied to this, the NJC has agreed to review how the NJC pay spine can be fairly adapted to meet the requirements of the NLW. Scotland will also have these discussions. At the time of writing, it was too early in the NJC talks to give guidance on the likely outcome and implications of the review for local pay and grading structures. However, the guide flags up possible approaches to local pay and grading which employers could favour in future. These approaches might also be proposed for smaller scale local reviews of pay and grading structures affecting certain services or occupational groups.

The core principles in this guide will remain relevant after the review of the current NJC pay spine and supplementary guidance will be issued as NJC negotiations on NLW implementation proceed. Branches should contact their regional office if employers are proposing to make organisation-wide changes to pay and grading affecting Green Book employees in advance of the outcome of NJC negotiations.

Irrespective of the impetus for local grading and pay reviews, or their scale, certain guiding principles must be applied when carrying them out. They are:

- Single status
- Equal pay and equality
- Openness
- Jointness

These principles applied to the single status grading and pay reviews and the unions’ stance is that they should continue to apply to pay and grading reviews carried out by local authorities and also by other employers whose employees’ contracts of employment incorporate the Red/Green Book.

The guiding principles are discussed in the next section. It is important that they are not lost sight of in ‘technical side’ of job evaluation, grading design and pay modelling. Equally, they should not be overlooked or sidelined in negotiating an

employers' offers and implementing new structures.

Although there is a different national agreement for Scotland and different governmental arrangements in Scotland, Wales and Northern Ireland, the same principles underpin equal value-based local pay and grading reviews. Equal pay law is broadly the same. Differences in relevant legislation, for example, in regard to the Public Sector Equality Duty, are mentioned in the guide. Check Northern Ireland, Wales and Scotland union offices for supplementary advice.

The guide does not cover how to carry out a job evaluation exercise. Separate union guidance has been issued on approved job evaluation schemes and best practice in evaluating jobs. A key source of joint advice is the technical notes issued by the National Joint Council (NJC) Single Status Job Evaluation Technical Working Group (see the resource list). While the technical notes apply to the NJC Job Evaluation Scheme (JES), much of the advice is equally applicable to other bona fide JE schemes.

Different job evaluation schemes are in use throughout the UK. The guide assumes the use of the NJC JES. So some of the diagrams of grading structures are based on NJC job evaluation scheme points. However, the broad principles are the same when using any JE scheme. However, please note that some legally acceptable JE schemes are nevertheless not approved by the unions – contact your union for more information.

For updates and additional information, please check your union's website. The local government employers' websites are also a useful source of information (see the resource list).

Local grading and pay reviews: Guiding principles

The guiding principles of the National Joint Council Job Evaluation Scheme (NJC JES) and the Scottish Joint Council (SJC) JE Scheme are : equal pay and equality; single status; openness and jointness. These apply just as much to developing a grading and pay structure as to carrying out a job evaluation exercise.

These principles (which apply to single status reviews) apply equally to local grading and pay reviews today. In detail, the guiding principles are:

Principle 1: Single Status

Single status refers to the process of creating a common set of terms and conditions of employment for groups of workers. In Local Government it brought together manual workers and Administrative, Technical, Professional and Clerical staff (APT& C) who had been previously employed under separate arrangements. In local government, the resulting National Joint Council and Scottish Joint Council agreements and local collective agreements are known as 'single status agreements'.

Single status – historical background

In the late 1990s, the Green Book and Red Book replaced the former national agreements for manual workers and APT&C staff. They provide national pay spines based on annual wages or salaries (in the case of the NJC agreement) and hourly rates of pay (in the case of the SJC agreement). These pay spines must be used by employers whose employees' contracts of employment incorporate the relevant collective agreement.

Single status introduced new national pay spines, but there were no nationally agreed grades and new grading structures had to be agreed locally. Sticking with the old grading methods or simply bolting the old manual grades onto the APT&C structures would have breached the principle of single status. Also, the APT&C grading provisions were archaic and did not conform to equal pay principles. The manual workers' national grading structure also needed to be updated. The 2005 Guide explains this in this detail and answers FAQs such as 'why weren't national grades included in the Green/Red Book?'

Single status today

The principle of single status is still relevant, firstly, in rare cases where local authorities may not have implemented it, or where private or third sector employers new to local government have different terms and conditions for manual workers and

'office' staff. Secondly, the changes happening in local government (outlined earlier) may lead some employers to treat manual staff differently from former APT&C staff, for example, bringing back spot rates of pay for manual jobs. So, branches should be alert to moves by employers to change local grading and pay structures in ways which would treat staff differently, thus undermining the principle of single status. In such cases, where the employer's proposals could disadvantage particular grades or occupational groups that have a predominance of one sex or another 'protected characteristic', they could be in breach of discrimination law (see section 2). Of course, where authorities have introduced the Resolution Foundation Living Wage, this may lead to single spot rates at the bottom of a structure, in order to accommodate the higher rate.

Single status can be seen as an incomplete project as not all groups of local government employees are covered by the same national agreements. Separate pay arrangements exist for teachers, registration officers, coroners, chief officers, Soulbury staff (education improvement professionals), youth and community workers, police staff, fire and rescue, and craft workers. These groups have separate collective bargaining arrangements, except for teachers who are covered by a Governmental pay review or equivalent body.

Craft workers

A significant number of councils have included craft workers in local single status grading and pay reviews, partly to reduce the risk of male craft workers being cited as comparators by female Green/Red Book employees claiming equal pay. Arms-length organisations (often former direct labour organisations) have also shown interest in including craft workers in single status arrangements.

The NJC Job Evaluation Technical Working Group has produced 14 craft worker model role profiles, evaluated using the NJC JES. These were issued to local authorities (England & Wales) in 2015 by the national employers' organisation, the Local Government Association (LGA). It should be noted that the profiles are advisory not prescriptive and that they have not been signed off by Unite and UCATT.

School support staff

National bargaining arrangements for school support staff have undergone various changes since the late 1990s. The current position is that school support staff in local authority maintained

schools must be included in local grading and pay reviews. In 2013, the NJC issued 59 school support staff model role profiles, evaluated using the NJC JES, to assist with the process.

School support staff employed by foundation schools, trust schools, free schools and academies are not covered by local government services national agreements unless their Green/Red Book terms and conditions of employment are protected under TUPE. It may also be the case that a new collective agreement may apply identical or similar terms and conditions to local government agreements, including provision for pay and grading review.

Public Health

Following the transfer of public health responsibilities into local government in 2013, a range of public health role profiles were drawn up to assist authorities in evaluating jobs.

Social Work

Following the Government's Task Force Report (2009) on the career pathways of social work staff, profiles were drawn up for a wide range of social worker roles. These are available in the NJC, Greater London Provincial Council and HAY job evaluation formats. (For more information, see NJC Job Evaluation Technical Working Group Note 16 (2017).

Principle 2: Equal pay and Equality

Equal pay

The NJC and SJC agreements state that 'the pay and grading of jobs must be fair and non-discriminatory, complying with equal pay legislation and associated codes of practice'.

In all of the above situations, the starting point must be the use of a common method of assessing the demands of jobs, using a union-approved job evaluation scheme wherever possible. So, for example, where a group of employees is treated separately as a 'market group', job evaluation scores should still form the basis of their grading and pay arrangements, as they do for other employees in the organisation. This is essential to preserve the principles of equal pay for equal work and single status, and to minimise the risk of equal pay claims.

If employers stop using job evaluation to measure the demands of jobs, there will be no transparent or robust basis for assessing their value. There are also dangers of this happening where employers use schemes which are not approved by the unions. In these situations, union representatives

should contact their regional office for advice. (See the section on legal issues for information on the validity and suitability of job evaluation schemes.)

Union representatives should also insist on the use of job evaluation where the employer wants to alter the grading and structure in order to move from a 'job-based' to a 'person-based' approach to pay and grading. If equal value-based job evaluation does not play a role in determining individuals' grading and pay, employers are in danger of breaking the law and facing equal pay claims.

Councils where single status reviews are not completed

Where single status has not been implemented, the starting point for a local grading and pay review is to recognise that existing grading and pay structures will not conform to equal pay principles, leaving the employer vulnerable to equal pay claims (where women and men are doing equal work but are not being paid the same).

If your employer has not completed a single status pay and grading review, you should also read the Trade Union Side Guide to Local Government Grading and Pay (2005 edition). It explains the background to single status and why the use of a common method of evaluating ex-manual and ex-APT&C (admin, professional, technical and clerical) jobs is necessary.

Equity

Some employers use the term 'equity' to encompass the principles of fairness and equal pay. Specifically, 'equitable reward processes' are said 'to ensure that relativities between jobs are measured as objectively as possible and that equal pay is provided for work of equal value' (Armstrong, 2015). This is not problematic in itself – fairness as well as equal pay is important, as the NJC and SJC single status agreements acknowledge. However, employers might talk about 'equity' in the belief that equal pay issues have been dealt with and to 'speak its name' could revive old battles best consigned to history.

Where employers prefer to talk about equity, branches should take care to ensure that equal pay considerations are not being forgotten about. From a union perspective, the maintenance of equal pay requires constant vigilance especially where organisations' structures and modes of service delivery are subject to frequent change.

Union representatives should also be aware that discriminatory terms in a collective agreement can be subject to legal challenge. In reaching negotiated settlements with employers, unions must also take care not to unlawfully discriminate against any group of members protected by the Equality Act 2010 (see Part 2).

Pay and grading structures should be subject to regular equal pay audits (sometimes called ‘equal pay reviews’) to check that there are no (statistically significant) persisting equal pay gaps from previous structures, or newly created ones. (See the later section on equal pay audits.)

Equal pay law

Since the publication of the 2005 Guide, the law on equal pay has developed. There have been test cases in the courts and changes in legislation, as outlined in Part 2. It is essential that union representatives involved in grading and pay reviews have a good understanding of equal pay principles and equality law. This is particularly important when you are dealing with management representatives (especially new employers in local government) who could have limited knowledge of equality law and little experience of applying legal principles to pay and grading reviews.

Whether you are involved in job evaluation exercises, pay modelling or negotiations over pay and grading local reviews (or all three), deploying your knowledge of the law and good practice can help to deter employers from cutting corners or pursuing options or proposals that would be detrimental and possibly subject to legal challenge. In addition, this knowledge is helpful in explaining to members why certain options are acceptable or not, in legal terms.

Because equality and employment law constantly changes, it is important to check your union website or other union sources for legal updates.

Equality

The national single status agreements state that ‘employees will be afforded equal opportunities in employment irrespective of disability, gender, race, religion, age, sexuality, and marital status’, (and in the NJC agreement) parental status, caring responsibilities and hours of work’. In addition, councils ‘will ensure that discriminatory practices are identified and removed and non-discriminatory practices introduced in all areas of employment...’

Union and joint guidance has been issued on implementing job evaluation in a non-discriminatory way. In relation to pay and grading reviews, the Green Book (2004 Implementation Agreement) states that an equality impact assessment (EIA) should be carried out on proposed new local pay and grading arrangements, including changes to other conditions. (See the later sections on equal impact assessment and equal pay audits.) EIAs are an important tool for detecting potential indirect discrimination.

Equality and equal pay are separate but related concepts. To illustrate the difference, a key objective of the single status pay and grading

review in local authorities was to eradicate any significant ‘equal pay gaps’ between the average earnings of female and male workers doing equal work. This might also reduce but not eliminate the ‘gender pay gap’ – the difference between the average earnings of female and male workers in an organisation.

The extent of the gender pay gap depends on how it is measured:

- whether the comparison is extended to all employees of a local authority, or restricted to Green/Red Book employees; and
- the method of calculation, for example, whether the comparison is made between full-time male and female workers’ average weekly earnings or hourly earnings (which takes account of the fact that in general men work longer hours than women and that many women work part time).

Discrimination in pay (exemplified by unequal pay) should no longer be a significant contributory factor to the existence of the gender pay gap in local authorities and other organisations where single status has been implemented – unless of course unequal pay creeps back. However, to reduce gender pay gaps in organisations will require sustained action on a wider front. Research indicates that the main causes of the gender pay gap in local government are occupational segregation and the unequal impact of family responsibilities, where women have the main caring responsibilities.

Occupational sex segregation refers to the phenomenon whereby different occupations can be seen by society to reflect ‘women’s work’ and be done mainly by women, while other generally higher paid jobs are seen as ‘men’s work’ done mainly by men. In 2016, in local government (England & Wales), 63% of women employees worked part-time while 88% of part-time workers were women (Office for National Statistics, 2016, quarter 1).

They are overwhelmingly located in jobs towards the bottom of the pay spine, although it is not necessarily the case in all local government organisations that women are under-represented in senior roles. Occupational segregation can also operate detrimentally in respect of disability, race, or age, for example. Disadvantage can be compounded when the different characteristics of employee groups intersect, for example, age group and disability.

Positive measures, such as ensuring training courses are fully accessible, extending the range of jobs suitable for flexible working (especially to higher paid jobs), providing training in jobs where there is under-representation of one group, and creating career paths to higher graded jobs could redress this imbalance.

This guide focuses on equal pay and equality

issues in relation to local grading and pay reviews. Closing the gender pay gap (or gaps relating to other 'protected characteristics') is a bigger project of which local grading and pay reviews are a small but important part. ('Protected characteristics' are the grounds on which discrimination is unlawful. They are set out in the Equality Act 2010.) Having said that, it is likely that future 'pay modernisation' in local government will have major equality implications, presenting opportunities and threats. These issues are flagged up in later sections.

Principle 3: Jointness

The Green Book agreement states 'local authorities should review their local grading structures....In conducting such a review, representatives of the recognised trade unions should be fully involved'. Unions take the view that locally they must be fully involved (as indeed the Red Book requires in Scotland). Under the terms of the NJC and SJC job evaluation schemes, job evaluation must be carried out on a joint basis, and it makes no sense to curb trade union involvement at the next stage of modelling options for new grades and setting the pay line.

The principle of jointness was reiterated and strengthened by the 2004 NJC Implementation Agreement. The list of issues which should form part of local negotiations on local pay and grading reviews includes pay and grading structures; details of the approach to be taken to determine the relative sizes of the jobs included; and proposals for performance payments (Paragraph 5).

Aside from the existing provisions of the NJC and SJC agreements, from an industrial relations perspective, jointness makes good sense – pay and grading reviews will proceed more smoothly if employers are open with union representatives and prepared to involve them.

While employers (at least traditional local government employers) will probably accept union involvement in JE exercises, they may resist it when it comes to modelling different grading and pay options. As modelling different options is part of the review process, this is not acceptable. Alternatively, some employers may be willing to involve union representatives in pay modelling, but exclude them from deciding the final pay line or pay levels on the basis that, at the end of the day, the employer reserves the right to determine pay. Our advice is to ensure that jointness continues by arguing that the employer is unlikely to succeed in implementing a new structure without joint ownership and input throughout the whole process.

Developing a grading and pay structure (or making substantial revisions to an existing structure) is a technical exercise in which many options need to be tested to achieve the optimal solution. Unless union representatives are involved in this, they will

not fully appreciate why certain options have been rejected or be satisfied that the final proposal really is the best option. If employers accept it is a joint exercise initially but then act unilaterally in finalising the pay line or pay levels, exclusion of the unions at this late stage is bound to create suspicion and concerns that the employers are unfairly manipulating the outcomes to suit their purposes. They may also be in danger of opening themselves up to rejection of the offer and/or potential equal pay claims.

Grading reviews create uncertainty. Union representatives need to be in a position to explain both the process and outcomes to members. This is particularly important where previous grading exercises have been carried out solely by management. Without being involved in identifying and analysing the impact of various grading and pay structure options, union negotiators will not be able to assure members that the best one has been selected.

The principle of jointness should apply to all local reviews of pay and grading irrespective of their scale. For example, where the employer carries out a review in relation to groups of employees in particular service areas, union representatives should be involved in technical work, as appropriate, and negotiations on, for instance:

- proposed changes to role profiles,
- job redesign,
- changes to career paths,
- setting market rates of pay,
- changes to pay progression (such as moving from incremental to performance-based or contribution-related systems)
- protection.

Final draft proposals should be equality impact assessed (see later sections of the guide) taking account of directly affected employees and other employees doing equal work elsewhere in the organisation.

The above advice on jointness applies to employers who are using the NJC, GLPC and SJC pay spines, including those that have added local points to the top of their pay spine and/or are paying the Living Wage. The next paragraph covers a different situation - where employers are proposing to use their own pay spine.

Local pay and grading reviews in advance of national negotiations on a revised pay spine

Most employers that apply the NJC/SJC agreements are likely to await the outcome of any national negotiations before embarking on 'root and branch' local grading and pay reviews affecting all Green/Red Book employees. Until it is clear what

changes will be made to the NJC/SJC/GLPC pay spines, there will be no new agreed parameters for local negotiation and employers who 'jump the gun' may find themselves in breach of the NJC/SJC agreements or investing wasted time in designing structures that will not conform to agreed national provisions. Although the current NJC/SJC agreements give local employers considerable scope to design their structures, they use the national pay spines as a base.

Branches dealing with employers who are intending to start 'root and branch' reviews in advance of the completion of national negotiations on a revised pay spine or employers who plan to break away from national bargaining should notify their regional office.

Principle 4: Openness

Openness is a key principle of the NJC and SJC job evaluation schemes. In contrast to many job evaluation schemes that have been used in local authorities, the NJC and SJC schemes allow employees to know how the scheme works and how the score for their own job has been arrived at. (Part 2 gives guidance on using the law to obtain data being withheld from the recognised union by employers on job evaluation exercises and pay and grading reviews.)

The principle of openness and transparency applies as well to the resulting grading and pay structure.

The Court of Justice of the European Union has held that pay systems that are not transparent are particularly at risk of being found to be discriminatory. To quote the Equality and Human Rights Commission *Code of Practice on Equal Pay* (2011), 'transparency means that pay and benefit systems should be capable of being understood by everyone (employers, employees, and their trade unions). It should be clear to individuals how each element of their pay contributes to their total earnings in a pay period' (Paragraph 102).

Once a review is completed, employees must be provided with full information on their new grade and pay point, assimilation arrangements, how progression through the grade will work, arrangements for back-pay and protection (as appropriate), and any other proposed changes to their terms and conditions.

Where the outcome of negotiations on local grading and pay reviews would result in changes to all or groups of employees' contracts of employment, the employer's offer should be subject to agreement by union members. If the employer's final offer is the best that can be achieved by negotiation but falls short of what some employees might reasonably expect to receive should they have equal pay or other valid legal claims, this needs to be explained. Members can then make an informed choice when

they vote on the deal. (These issues are covered in more detail in the implementation section of the guide).

Local grading and pay reviews (post single status)

Proposals for local grading and pay reviews could arise in these circumstances:

- Following a reorganisation, the employer wants to introduce new arrangements for grading and/or paying some or all employees in the affected service/s. This could happen, for example, following management 'de-layering' and other staff cuts, necessitating changes to remaining employees' roles.
- Shared services arrangements which bring together employees from different organisations who are graded and paid differently although their jobs were evaluated using the same JE scheme.
- As above, but with different (union-approved) job evaluation schemes being used; or
 - Where the jobs of employees from one organisation have not been evaluated; or
 - Where the jobs of employees from one organisation have been evaluated using a scheme which is not union-approved.
- Following the transfer of undertakings
- Ongoing monitoring and maintenance of job evaluation schemes

Getting organised in the union

As mentioned, grading reviews create uncertainty for employees and, in a climate of austerity, union negotiators will be concerned to ensure that local grading and pay reviews do not simply become a vehicle for delivering cuts to terms and conditions. However, no grading and pay structure can last forever, and there are disadvantages for employees as well as employers in maintaining outmoded structures. Maintaining the status quo is not an option where, for example, employees doing equal work in shared services are graded and paid differently.

Grading reviews are a key organising opportunity – to protect employees and to maximise the chances of securing the best possible deal. Well organised workplaces and branches will be in a much stronger position to resist cuts-driven proposals from employers. Local government employers know this – they cite 'union resistance' as a major obstacle to 'pay modernisation'.

Even if there is nothing to be gained from 'pay modernisation', it will not be possible for the unions to maintain a stance of permanent opposition. The introduction of new NJC and GLPC pay spines will require authorities to check their pay and grading structures in conjunction with the unions. Opted out

councils will also need to check their pay structures in relation to NLW increases.

Negotiations on the review of the NJC pay spine may take some time. Branches are urged to use the time to recruit members, to strengthen their workplace organisation and, importantly, to organise training for union representatives who could be directly involved in job evaluation and/or grading and pay reviews.

For a local grading and pay review, the branch will need a team - not lone individuals - working together in a planned and coordinated way, with support available from regional and head offices. Branches should also share information with each other on experiences and outcomes elsewhere in the region and nationally.

Good union organisation is just as important in relation to smaller scale local reviews. Where there are shared services or new employers, the starting point is likely to be a membership audit. There may also be implications for branches' internal organisation, recognition and bargaining arrangements with the employer. Each union will have its own procedures for dealing with these matters.

The recommended options for job evaluation

Why job evaluation?

In light of the recent history of equal pay litigation in local government, it would be unusual for an employer to resist the use of job evaluation as a tool for establishing the value of jobs in relation to each other. Importantly, the use of a valid JE scheme which is free of sex discrimination and otherwise reliable, blocks equal value claims where the work of the claimant and the comparator has not been 'rated as equivalent' under the JE scheme. Current debates over job evaluation are more likely to focus on the extent of JE exercises than its use in principle.

Which job evaluation scheme?

The local government single status agreements do not prescribe the use of a particular JE scheme, for reasons explained in the 2005 Guide. Nationally, UNISON, UNITE and GMB only support the use of the following schemes which have been designed and/or approved by them at national level:

- The NJC Job Evaluation Scheme (included in Part 4 of the Green Book)
- In Scotland, the JES developed for Scottish councils, recommended for use by the Red Book

In Greater London, the unions agreed to use the Greater London Provincial Council Scheme (the GLPC Scheme) which was developed by the

employers' side of the Provincial Council with some input from the trade union side. It includes a recommended 'points to pounds' formula for Inner and Outer London indicating grades for ranges of job evaluation scores. The GLPC Job Evaluation Scheme has also been used wholly or primarily in the South West, Northern Ireland and Wales.

There are other proprietary schemes on the market and some local government employers developed their own schemes. Critiques of some other schemes are available from union head offices.

The unions have taken the stance that other schemes may be acceptable only if they meet the criterion set out by the Local Government Pay Commission (2003) that '... the principles and safeguards which are found in the NJC scheme are demonstrably present in another scheme'. NJC Technical Note 2 sets out the principles of the NJC JES.

If an alternative scheme can be demonstrated as meeting the principles of the NJC JES, the Local Government Pay Commission stated that union representatives should not oppose its use (or insist on the NJC JES) on those grounds. (See Part 2 for information on legal challenges to JE schemes.)

Despite the hostility shown towards the NJC JES in its early years from some quarters, it has stood the test of time and it is the most commonly used JE scheme for Green Book employees.

In keeping with EHRC guidance, the NJC reviewed the JES in 2013. The review found that the scheme was sound and robust. No fundamental changes were needed to the design of the scheme (i.e. the factor definitions or the scoring and weighting matrix). Some changes were made to the factor guidance notes to update them and make some clarifications. The Gauge computerised version of the scheme incorporated these updates in its help text. The Part 4 job description questionnaire was also updated and the NJC JE Technical Working Group (JETWG) subsequently updated the technical notes, which give guidance on the implementation of job evaluation.

The SJC and Greater London Provincial Council (GLPC) have also reviewed their job evaluation schemes.

The strengths of the NJC JES are:

- It was jointly developed by the trade unions and the employers, in line with the principles of single status
- It was specifically developed, and tested, to cover the whole range of local government jobs
- It was designed on the basis of equal value principles; and this is reflected in the factor plan and weightings (see NJC Technical Note 5 on the JES factors and weightings)
- It is an open and transparent job evaluation

scheme (unlike some schemes which do not reveal all aspects of their design and scoring systems to job holders)

- It is accompanied by joint advice for users (in Part 4 of the Green Book, advisory Joint Circulars and NJC JETWG technical notes).
- It must be operated on a joint basis by trade union representatives and management locally
- It is available for use in computerised or paper-based form
- The scheme and the user manual are available free of charge to NJC authorities
- There is a Part 4 commitment to jointly review the JES as necessary to maintain its relevance and integrity.

In the public sector at least, most criticism of job evaluation tends to be about the way it is used. For instance, the LGA warns:

‘Problems arise because employers place too much emphasis on the outcomes of job evaluation when determining individual pay. Job evaluation should only be part of the pay jigsaw. As a subjective process, not a science, the outputs should determine the grade of a job but other elements should be considered when determining individual pay, e.g. performance, competence. If a local authority develops a pay structure with narrow bands tightly linked to job evaluation outputs then the job evaluation system will constantly be subject to challenge and appeal as the only means by which individuals can increase their level of reward’ (LGA, 2012).

At that time, the LGA view appeared to rest on a theoretical criticism of narrow grades rather than actual evidence of this being a widespread or enduring problem in local government. There would seem to be very little evidence that local authorities have been plagued by appeals, when the exercise has been properly conducted, at least beyond the immediate post-implementation period when it is not uncommon for there to be an initial flurry of appeals. Employers were (and are) able to minimise the risk of perpetual appeals by not drawing grade boundaries through clusters of JE scores and ensuring that each higher grade represents a step-up in demand (as measured by JE points).

Do all employees’ jobs have to be evaluated?

In relation to the NJC JES, in 1997, the Part 4 advice was that ‘over time, every job (but not necessarily every job holder) should be evaluated’ (Part 4.1, Appendix 3, para 4.1). This is important in order to ensure that the JE process covers all distinct jobs in the organisation. If some jobs are left out, this could call into question the validity of the JE exercise as a defence to equal pay claims (see Part 2 on the law and JE).

The advice to evaluate every job led some employers to criticise JE, and union-approved schemes in particular, as being bureaucratic, time-consuming and expensive to carry out. There was particular concern about the scale of the exercise in large organisations. Some of the criticism was based on a lack of clarity or understanding about the extent to which jobs could be ‘matched’ for JE purposes. It had been made clear by the Court of Appeal in 1988, in the case of *Bromley & ors v H & J Quick Ltd* 1988 IRLR 249 CA, that non-evaluated jobs could not simply be slotted into a structure of evaluated jobs on a ‘whole job’ basis. This would not be an ‘analytical’ JE study in terms of what is required by equal pay law. However, it would be permissible to compare those jobs on a factor-by-factor basis against the appropriate fully evaluated jobs and then to place them in the structure accordingly. This would be an analytical and thorough approach. Additionally, the same or broadly similar jobs could be clustered together in a single evaluation process, whether it be matching to a profile or evaluating to a questionnaire. Following the principles set out in *Bromley v Quick*, the JE TWG issued advice on the use of generic job descriptions and evaluating ‘representative’ jobs.

Job matching came under legal scrutiny again in *Hartley & others v Northumbria Healthcare NHS Foundation Trust*, 2009, a test case in the Newcastle employment tribunal concerning the JE process being carried out as part of the NHS Agenda for Change (AfC) agreement (see Part 2). In brief, AfC was the NHS equivalent of local government single statutes – creating one pay system for different employee groups.

Unlike the NJC and SJC agreements, AfC included national job profiles. These were fully evaluated using a bespoke JE scheme. Locally, particular jobs were then to be matched against a suitable national profile based on a factor-by-factor analysis. Some variation was permissible; in this case a suitable match would be to have:

- an exact match to knowledge and freedom to act levels in the profile,
- variations in 5 other factors provided it was no more than one level higher or lower than the profile and
- the resulting score was within the scoring band of the profile.)

If there was no suitable match, the job was to be evaluated at local level using detailed joint guidance. For some jobs, a mixture of the two approaches could be used.

The ET held that this methodology was a valid JE study. The matching was done on an analytical factor by factor basis. The judgment (which was not appealed) also clarified the legality of other aspects of the process, including the acceptability of the use of generic role profiles and the use of

‘representative jobs’ (where the JE score for one job is applied to a cluster of jobs which are virtually identical to it).

The NJC JE Technical Working Group (JETWG) has issued guidance in regard to job matching, including Technical Note 11 & Appendix, *Job Information for JE* (2012) and Technical Note 16: *Job Profiles* (2017). It has also developed model (advisory) role profiles for a number of groups of local government groups (see the Resource List for more information).

It is important that, where they are to be used as a basis for matching and evaluating jobs, locally produced role profiles are based on an accurate, up-to-date assessment of the demands of the job.

The current joint advice on the use of role profiles and job matching should help allay employers’ fears about the laboriousness of job evaluation. Of course, to carry out JE properly will require employers (and branches) to invest the necessary time and resources. Experience has shown that cutting corners in carrying out JE is a recipe for disaster. For most employers, (apart from the smallest) the use of computerised JE should be cost-effective and speed up the process. The ultimate answer to give employers who resist using job evaluation is to point out that the cost and inconvenience pales into insignificance compared to the time and cost involved in defending and losing equal pay claims; the cost of which can run into millions of pounds.

How many job evaluation schemes?

The NJC guidance states that ‘where an organisation uses more than one JE scheme it could increase the risk of legal challenge, as well as present practical difficulties in application. The legal risk is likely to be greater the lower down in the pay structure that the cut-off point for the application of the schemes is set, as it is more likely to impact on jobs and grades which are predominantly filled by women’ (Green Book, Part 4.9, paragraph 10.2). It goes on to state (at para. 10.3):

‘An organisation that applies two schemes is likely to be faced with some or all of the following problems:

- it may be difficult to objectively justify by reference to the requirements of the organisation
- determining where to place the cut-off/divide between the two schemes to ensure that they give similar rather than different outcomes; and
- designing and applying methods to test the evaluations of jobs within the boundary between the two schemes.’

A number of local government organisations use one job evaluation scheme for senior posts, for example, the HAY system, and the NJC JES for all other jobs. In the context of single status reviews,

problems have mainly arisen where organisations also sought to use the HAY system for some or all ex-APT&C principal officer (PO) level jobs and in a few cases for senior officer (SO) jobs as well. The difficulty concerns jobs at the boundary between the two schemes. First, it is necessary to agree a procedure for dealing with jobs which evaluate within a specified number of points from the maximum of the NJC scheme range, which would normally be to evaluate these jobs also using the senior job scheme. However, this can be problematic if the two schemes give different weight to features of the boundary group jobs, so that, for example, some jobs scoring exceptionally well on the NJC JES do not score well on the senior job scheme. If the jobs affected are female-dominated, then this could give rise to equal pay claims.

The positioning of the boundary is important. Where only the most senior jobs (i.e. chief officer posts) are evaluated under a second scheme, the problem is restricted and the risks of equality issues arising are limited. If, on the other hand, most managerial and professional jobs are to be evaluated on the senior job scheme (for instance, if the boundary were at the lower PO grades on the old APT&C structure), then the boundary group will be large and probably comprise a mix of female and male employees—and the problems described above could be significant. (This issue is discussed in more detail in Part 2).

In the context of single status reviews, some organisations sought to move the boundary between the two schemes much lower down for cost reasons. In 2004, UNISON issued advice to their branches and regions that any second scheme should be restricted to chief officer posts and where the council wished to lower the boundary much below chief officer level, this should be resisted vigorously.

The equal pay risk of using two JE schemes could be increased where the employer proposes to replace narrow grades with a broad-graded structure, possibly with job families which encompass more senior level roles. In job families where managerial jobs predominate, the employer might choose to use the HAY system selectively for those job families but there could be some employees in other job families who are doing work of equal value. The obvious way to resolve this is to use the same scheme for all job families. This can create a problem for the union representatives in that higher graded employees might prefer HAY to be used while lower graded employees are likely to want their jobs to be evaluated using the NJC/SJC/GLPC JES.

In any event the organisation will need to undertake an equality impact assessment of the effect of the use of two schemes prior to implementation, and undertake regular equal pay audits of the outcomes of the two schemes.

Part 4.9 of the Green Book provides guidance on the use of two job evaluation schemes. UNISON officials are also referred to UNISON guidance on the use of two schemes – *Divide and Rule: Issues arising from using more than one scheme in a single organisation*.

Local pay and grading reviews – nil cost is not feasible

There is no such thing as a cost-free grading and pay review. Leaving aside the costs of implementation, there will be costs incurred in carrying out job evaluation, designing new grading and pay structures and (in some organisations) harmonising terms and conditions. These costs include staff time (HR, IT staff, managers, evaluators, for example), training those involved in these processes, paid time-off for union representatives, and possibly purchasing software, subscriptions to pay databases, using external consultants and obtaining legal advice.

These costs will be considerable for employers who want to replace traditional narrow-graded structures with broad-banded or broad-graded structures, and/or to replace incremental progression with (for example) competency-related or contribution-related pay. Although there may be savings through assimilation and progression, the costs are not just administrative – change on this scale will entail culture change for most organisations, necessitating ‘change management’ and at a practical level, investment in developing new management systems and procedures. (Tellingly, the *LGA Workforce Survey 2014-15* findings revealed that 62% of respondent councils in England reported having ‘a capability or capacity skills gap (or both)’ in relation to ‘change management’.)

Any radically new grading and pay system will need to have an infrastructure in place in the organisation to support its introduction, such as robust systems for assessing employees’ competence and/or contribution. If it is not properly managed, pay progression that is person-related rather than job-related carries the risk that salary costs run over budget. And if the new system is not operated competently and fairly, there are likely to be added costs arising from employee dissatisfaction and workplace conflict (for example increased turnover, industrial action), and increased risk of litigation (for example, breach of contract, equal pay or discrimination claims).

Lowering the pay line – then and now

In the late 1990s, it was not uncommon for local authorities to state that single status must be implemented at nil cost. At the time, the unions warned that this was simply not feasible, whatever job evaluation scheme was used. If only a few

jobs were upgraded relative to others, and any downgraded jobs were protected, then that would have generated a cost to the employer. And, if significant groups of jobs were upgraded relative to others – the probable outcome of evaluating ex-manual jobs alongside ex-APT&C jobs – then there would be a significant cost.

The reality that nil cost was not feasible began to dawn on employers once the likely outcomes of job evaluating the single status workforce became clear. It was evident that significant numbers of jobs (mostly occupied by women ex-manual workers) would have to be upgraded. This contradicted the often-quoted but baseless ‘rule of thumb’ that following a JE exercise ‘a third go up, a third stay the same and a third go down’.

In modelling options for grading and pay structures, management may favour lowering the pay line (see the later section) to reduce the costs of the new structure. This can apply across the board but typically the pay line is lowered in respect of employees in a specific grade (or grades) to offset the cost of upgrading employees elsewhere in the proposed structure. Sometimes the reason given for lowering the pay line in this way is that the current salaries of the affected jobs are ‘uncompetitive’ i.e. they above market rates. As is discussed later in the guide, in some organisations, lowering the pay line can have a particularly negative impact on groups of former APT&C jobs (mainly held by women.)

The lessons from single status pay modelling are firstly, that in any local grading and pay review, union representatives should be involved in the process and be on the alert for the use of this technique. Secondly, final draft grading and pay structures must be equality impact assessed. This should include an analysis of the distribution and scale of loss and gain by grade and (at least) gender. Equality impact assessment should reveal if significant numbers of employees are affected by lowering the pay line and any potentially discriminatory impact.

The extent of loss, gain and no change can be assessed by carrying out an analysis of red, green and white circles. ‘White circles’ refers to employees whose pay is unchanged by a local pay and grading review; ‘green circles’ are gainers; and ‘red circles’ refers to employees whose pay (and substantive grade) will be lower under the new structure. Protection arrangements usually apply for red circled employees – see the later section on protection.

Overall, the recommended approach to handling the issue of cost is to develop sensible draft grading and pay structures to suit the needs of the organisation, then to cost the proposals and then to discuss how they can be implemented. Initial costings may lead to refinements to the proposed grading and pay structure, but it is important that it

is this way round (so that then costs are not the ‘tail that wags the dog’) and that the reasons for any changes are clearly understood by all.

It is also important to identify separately the costs of implementation and the ongoing revenue costs. UNISON officials are referred to UNISON guidance on understanding local government finances.

There are other ways in which employers can seek to reduce the costs of implementing new structures some of which might be acceptable as short-term measures (such as phasing-in pay increases for upgraded groups,) although this will mean that equal pay may not be achieved immediately. However, as part of single status implementation, Part 3 terms and conditions became the main target for employers’ attempts to contain or claw back costs.

Part 3 conditions – then and now

Green and Red Book Part 3 terms and conditions are ‘national provisions which may be modified by local negotiation’.

In some authorities, changes to Part 3 terms and conditions formed part of the single status package on offer to employees. In some cases, where agreement could not be reached, employers imposed new contracts of employment incorporating changes to Part 3 provision. But in most authorities, at the instigation of the employer, local negotiations on Part 3 terms and conditions took place separately from, and after, the implementation date of the pay and grading review.

Enhanced rates of pay for weekend working and unsocial hours were identified early on by employers as targets for reductions or removal. Adverse impact on part-time women workers in particular was raised by the unions with the Local Government Pay Commission (2003). Consequently, the 2004 NJC Implementation Agreement specified that local pay and grading reviews should include an equality impact assessment of proposed changes pay and grading ‘and other conditions’. Some employers have recognised the impact on lower paid workers- mainly women- of removing enhancements and have retained them, although at a reduced rate.

Equal impact assessments (EIAs) were - and still are - an important source of information for union representatives to use in seeking to prevent reductions in terms and conditions, specifically where an EIA reveals that proposed changes impact adversely and disproportionately on employee groups who share a (in legal terms) ‘protected characteristic’. (See the later section on equality impact assessment).

Since the mid-2000s, Part 3 conditions have come under increasing attack from employers. The main driving force has been – and continues to

be – the impact of austerity on local government organisations.

According to an LGA survey (2012), by 2011, the main changes made (or being ‘looked at’) by local authorities in England & Wales to Part 3 were:

- Car allowances (all respondents had made or were intending to make changes - mainly adopting HMRC rates; and removing essential user allowances and lump sums)
- Unsocial hours payments (changes made by 35.7%; being looked at by 35.3%)
- Overtime (changes made by 32.1%; being looked at by 35.7%)
- Premium rates (changes made by 34.8%; being looked at by 31.3%)

As we all know, employers have also responded to austerity by shedding jobs and reducing the number of permanently employed staff. The use of temporary and casual workers has increased. In 2016, 12.9% of local government employees were ‘temporary/casual’ (ONS, quarter 1). Probably the starkest change has been the substitution of permanent part-time workers by workers on zero-hours contracts. The employment status of these workers varies – some organisations treat them as casual workers i.e. they are not ‘employees’; in other cases, they are employed under a contract of employment which sets out the ‘zero hour’ working time arrangements. The legal aspects in relation to equal pay are discussed in Part 2.

Designing a pay and grading structure

Negotiating guiding principles

Before the start of the pay and grading review, the union side is strongly advised to propose a set of guiding principles for this exercise to management. This is not the same thing as a list of bargaining objectives or claims – it is about how both sides will conduct the review – it gives an agreed framework for both sides to work and negotiate within.

This is a real-life example of a ‘core’ set of guiding principles:

- Joint ownership of all phases of the work with the union
- Commitment to an open and transparent process for deciding new grades
- Recognition that both sides are committed to finding a solution which will ensure that equal pay for work of equal value considerations were fully met
- Commitment that grades would be based on relative job size; and that market issues would be addressed separately.

The wording needs to reflect local circumstances. For example, the agreed principles could include a commitment to implement the (non-statutory) Living Wage (where this is an agreed objective).

As a principle, it is unlikely that a pay structure wholly based on market rates will be equal value proofed.

Experience with single status reviews suggests that delegation by management of the exercise to ‘someone in HR’, without a corporate approach, including the active involvement and cooperation of senior managers in all departments, is doomed to failure. It is also sensible for the union representatives to establish, at an early stage, if the employer has the organisational capacity to carry out and implement the review, and if not, how this will be rectified. In organisations which have a top tier of elected or lay office holders, it is also important that they are kept on board.

In addition to guiding principles, there will be practical, detailed aspects of working together that will need to be agreed, for example, over access to data and data protection.

It is also advisable to think about how differences between the union side and the management representatives are going to be handled, particularly if there is a breakdown in joint working or, at a later stage, in negotiations over the proposed deal. Local authorities will most likely have disputes procedures – other employers operating in local government may not. In such cases they should be encouraged

to adopt the Advisory, Conciliation and Arbitration (ACAS) model. During the job evaluation and pay modelling phases, every attempt should be made to resolve differences informally by (for example) getting assistance from your regional official, or (if agreed and appropriate) calling on external technical support.

What should a local review cover?

A good starting point is list of items set out in the NJC 2004 Implementation Agreement. This should be followed in any outstanding single status negotiations and, unless and until superceded by updated SJC/NJC guidance, the trade union side advice is that it should also apply to ‘post single status’ local grading and pay reviews in local authorities and other organisations whose employees’ contracts incorporate Green/Red Book provisions.

(Note: The 1997 NJC implementation agreement also still applies in England, Wales and Northern Ireland)

The relevant provisions of the 2004 Implementation Agreement are as follows:

‘Local pay and grading reviews should include:

- the approach to be used to determine the ‘relative size’ of jobs to be included in the review
- proposals for protection
- proposals for premium rates of pay
- proposals for progression (through the grade/s)
- proposals for back pay (in resolving equal pay issues)
- proposals for appeal against assimilation proposals
- an Equality Impact Assessment of proposed changes to grading and pay and other conditions
- an Equal Pay Audit where local pay reviews have been completed without such an audit
- proposals for bonus and other performance payments
- proposals for any cost savings or productivity improvements required to offset the cost of implementation of the new grading and pay arrangements
- resources necessary for the pay review and their estimated cost.

Branches should also think about what positive proposals they will be putting forward, not only on pay and grading and other conditions of employment, but also on work-life balance,

equalities at work and workforce development.

For all local grading and pay reviews, it would be advisable to agree an implementation plan. The NJC Implementation Agreement 2004 provides a template in that the parties should 'agree a local timetable which will include a date at which any outstanding issues will be referred to an assisted bargaining process (involving an agreed third party)' and it should be agreed that 'local employers will propose a timetable for regular pay audits'.

Getting employers to formally agree to a timetable for future equal pay audits is very important. This helps ensure that regular audits will happen. Even where there is a stated commitment to carry out equal pay audits elsewhere, for instance in the organisation's wider equality strategy or equality scheme, these plans may not specify timescales and in any event they are prone to alteration. If an organisation's priorities or leadership changes, undertaking regular equal pay audits can drop off the agenda.

Designing a grading and pay structure based on job evaluation

The process and principles of carrying out a grading and pay review are broadly the same, whatever job evaluation scheme is used, although some schemes come with a 'points to pounds' formula which provides ready-made grades.

When?

Although detailed grading and pay structure proposals cannot be produced until virtually all the job evaluation results are available, it is essential to start considering the options at a much earlier stage—even before the job evaluation exercise is under way.

Job evaluation is only a tool for putting jobs into an overall rank order. It is a means to achieve a new grading and pay structures. It is not an end in itself.

A sensible approach might look like this:

- Outset of the exercise - consider principles for new grading and pay structures, for example, agreement to use the SJC/NJC pay spines, flat rate salaries or pay scales, method for pay progression (see below)
- After the benchmark (a representative sample of jobs) exercise - test main options; make ball-park cost estimates; move towards preferred option. For more information on the use of benchmarking in the implementation of job evaluation, see NJC Job Evaluation Technical Note 3.
- After the evaluation exercise is complete - refine and cost option(s) and draw up detailed proposals.

What sort of pay structure?

Your employer may raise some of the following questions of principle:

- Is the organisation going to pay individuals according to going market rates only, without considering internal relativities (i.e. the relationship between salaries within the organisation)? This type of pay system is used in some private sector organisations. You should strongly resist this, as it is very difficult to operate and is unlikely to meet with 'equal value' criteria. (This does not rule out 'market supplements', if required - see below).
- Is the new pay structure going to be based on the NJC/SJC pay spines? An organisation might want to design its own pay spine instead. You should argue against this, as the authority would be breaking away from the NJC/SJC agreement (and arguably breaching individuals' contracts). Please note this is different from situations where the local authority has added spinal column points to the top of the NJC/SJC pay spine and/or where organisations have implemented a Living Wage and no longer use some of the bottom points.

Key first stage questions

Initial proposals from the employer could be expected to cover the following issues:

- Fixed (spot) rates or pay scales?
- If pay scales, what sort of progression system?
- How many grades or bands in the new structure? (More, the same or fewer than at present?)

Step 1:

There are a number of pay structure options. The first question is whether the new structure should be based on fixed points or salary scales:

Fixed points (or spot salaries or rates): this was the system applied to manual workers in local government before single status, where each grade has a single rate of pay (paid in pounds per hour, but could be a rate per week, month or year). There is no progression up to the 'rate for the job' and no progression beyond it.

The perceived advantages of fixed point salaries are that everyone is paid the 'rate for the job' from day one, so it is the fairest and least discriminatory system. It is simple to understand and transparent. (The legal aspect of pay transparency is discussed in Part 2.)

The potential disadvantages are said to be:

- There is no reward for the additional expertise which comes from experience in a job
- Employees may be demotivated by the absence of salary progression; this may affect recruitment

and retention

- A fixed point system could mean not using all the available points on the NJC/SJC pay spine

A variation on traditional 'spot rates' is where some jobs in the structure are paid a spot rate but with a defined pay range attached to either side of the spot rate to allow for some progression based on performance, competence or contribution (see below).

The 2014/15 LGA workforce survey found that only 4% of English local authorities were using spot salaries for the majority of their staff. Figures were not available as to how many used spot salaries for any groups of employees. However, there is a trend for a Living Wage spot salary.

Salary scales: this is the system used in most single status pay structures, where the scale for each grade runs from a minimum to a maximum point on the spine, with a number of scale points between up which the individual has the opportunity to progress.

The perceived advantages of salary scales are the reverse of the disadvantages of fixed point salaries:

- The system allows for acknowledgement that experience (and training) lead to higher levels of expertise
- The opportunity to move up the salary scale provides an incentive to employees to remain in post, and thus assists with recruitment and retention
- The design of the NJC/SJC pay spines assumes a scale system.

The potential disadvantages are said to be that:

- It may take some years to progress to what is understood to be the 'rate for the job' (especially if this is regarded as being the maximum point of each scale).
- The system is less transparent than a spot rate system, more complex and (if scales are lengthy) it is open to challenge on discrimination grounds.

As a rule, structures with both spot salaries and incremental scales should be avoided because of their potential to be discriminatory.

In general, the NJC and SJC unions recommend using incremental scales rather than fixed points. These should not exceed four or five points per grade. (Most single status agreements in local government feature short salary scales of from three to five points per grade.)

A strict equality approach suggests that all grades should have the same number of spinal column points. This would avoid (for example) female dominated grades, or those with disproportionately high numbers of black and ethnic minority employees towards the bottom of the structure, being disadvantaged by having fewer opportunities for incremental pay progression than white male

dominated grades at the top of the structure.

However, for practical reasons, slight variations are permissible. To give a real life example, in one authority with ten grades, the bottom six grades have three salary points per grade, and the top six grades have four points. In another example, grades 7 to 9 in an eleven-grade structure have five points each while the other grades have four incremental points. While these variations may be acceptable in order to reduce the need for protection or recognise professional development, any greater variation would be likely to be seen as unfair by employees and be difficult for the employer to objectively justify (see Part 2 on cost as a justification).

An incremental scale with up to four or five points would probably be justifiable where it could be shown that up to four or five years service equated with the time it takes to achieve full proficiency or competence in the job. But longer incremental scales could be indirectly discriminatory, in that women (and possibly other groups) may have less opportunity to acquire the necessary length of service to reach the better paid, higher levels of the grade, unless the length of time it would take to reach the top end of the scale could be justified by an objective reason. (This is discussed in more detail in Part 2.)

An incremental scale of up to five steps (equating to five years service) would conform to the age-related exception to service-related benefits permitted under the Equality Act 2010. Longer scales may not be age discriminatory provided they fulfil a business need. However, our view is that even if the employer could justify age discrimination on this ground lengthy scales could invite other challenges, especially where a high proportion of the workforce is female.

Step 2:

Pay progression

There are a number of options for pay progression, which the employer may propose:

- Incremental progression (sometimes referred to by HR and reward consultants as 'time-served progression', implying that progression through a grade or pay band is automatic and not dependent on meeting any performance criteria)
- Performance-related pay
- Competence-related pay
- Contribution-related pay
- Combined systems of pay progression.

Incremental or 'time-served' progression

Under this system, employees progress annually from their entry point to the maximum of the scale, so if there were five incremental points this would take five years.

It seems that annual incremental progression remains the dominant type of pay progression. For example, of the councils (in England) that responded to the LGA workforce survey 2014-15, 71% said they used incremental progression for the majority of staff.

Besides the fact that its use is embedded in local authorities, there are clear advantages for employers in using incremental progression:

- It allows for a high level of salary cost control – the annual cost of progression is predictable as there is very little scope to deviate from awarding annual increments on any scale.
- An element of performance management is provided for in that most incremental progression systems have provision for increments to be withheld for less than satisfactory performance or accelerated for exceptional performance, although, in the past, in local government these provisions were rarely activated.
- It is inexpensive to administer – in comparison with the alternatives discussed below.
- It is perceived as fair by employees – everyone is treated alike; managers have very little discretion to reward some individuals and not others. **In contrast, performance-related pay has been shown to be a significant source of workplace conflict and employee dissatisfaction.**

The main downside from employees' perspective is that once individuals have reached the top of the scale, they are stuck there, often for many years. Bearing in mind that (in 2014/15) around two-thirds of the local government workforce (excluding teachers) earned less than £21,000 basic per annum, time-served progression plays a part in trapping workers in low pay. However, as long as austerity prevails, there is no guarantee that most employees would be better off with an alternative system of pay progression – the reverse is more likely (see below).

From the employers' perspective, the downside of incremental progression includes 'grade drift' i.e. to escape the grade ceiling, managers support the upgrading of employees. So-called narrow grades based on job evaluation are also criticised on the same grounds – they are said to encourage grading appeals. However, there is little evidence that this is an issue in local government organisations. So-called time-served progression is also said to be demotivating and to inhibit workforce productivity. The extent to which pay (on its own) motivates employees in public service jobs is open to debate – the unions' evidence is that typically employees 'go the extra mile' out of a sense of duty not reward considerations.

The 2014/15 LGA workforce survey indicated that 22% of employers in England used contribution/ performance related progression for the majority of staff. In the civil service, traditional pay structures

based on incremental progression are under attack – some agencies are adopting spot rate structures – and, in 2015, the LGA was actively encouraging councils 'to think about how best to link pay to contribution.'

Branches can expect more employers to express interest in alternative systems for progression as financial constraints continue.

Performance related pay (PRP)

PRP is a system where individual employees progress if their performance is assessed as satisfactory or above, generally by their line manager and usually, but not always, against a set of published performance criteria.

An indication of the use of PRP in local government can be gained from responses to an LGA survey (2013). Of councils that had moved to a new system of progression between 2009/10 and 2013/14, the majority (36%) had adopted individual performance related pay.

The 2013/14 LGA survey indicated that existing PRP systems in local authorities were not sophisticated, suggesting that some employers might simply be activating existing (ex-APT&C) provisions that enable increments to be withheld or accelerated, or modifying these provisions. For example, by withholding increments where performance does not meet expectations; and making non-consolidated payments to individuals whose performance exceeds expectations and to those on the top of the scale who are deemed to be exceptional achievers.

It is interesting that PRP was the most commonly used 'new' system given that in the late 1990s there was an employer backlash against it and today it is widely regarded in reward management circles as a blunt instrument. However, from a HRM (Human Resource Management) perspective, it is the least complex alternative to incremental progression and may provide a foundation for movement to a more sophisticated pay system in future.

The unions' view remains that, as a rule, the use of PRP is inappropriate in local government and should be resisted.

While some HR managers and reward management consultants might argue that PRP is the way forward, there is a substantial body of international research which shows that the benefits claimed for PRP are highly questionable. To highlight some of the key findings:

- Its effectiveness in recognising and rewarding better performance depends on accurate and fair assessment of individual employees' merit.
- It has to be well managed to improve organisational performance (or it has the opposite effect) and it is difficult to manage well.

- It is possible to show a correlation (relationship) between PRP and improved organisational performance but not causation. (In other words, a link can be found between them but it has not been shown that PRP itself is the cause of improved performance.)

Another benefit claimed for PRP is that it helps attract and retain high quality staff. This is highly debatable – other factors can be more important to employees in public service roles, especially where the budget for PRP is limited and line managers are constrained by rules such as ‘forced distribution’. This places pre-set limits on the percentage of employees who can be assessed and rewarded as being above average or excellent performers. In the civil service, forced distribution is the source of many employee grievances as it is fundamentally unfair. In defence of forced distribution, it is claimed that the pre-set limits reflect the normal distribution curve of individuals’ assessed performance (in other words, much the same result should occur in any event) which begs the question – why use forced distribution?

PRP and other alternatives to incremental pay progression can seem very attractive to employers in theory – putting them into practice is altogether another matter – which probably partly explains why local government organisations have not rushed to use them. Where an employer wants to introduce PRP, union representatives should ask searching questions as to whether the employer has the organisational capacity and resources to introduce and operate any new system of pay progression. If line managers are not on board and/or are not properly trained and supported, the venture will most likely be doomed from the outset and waste time and resources. This applies to basic PRP as well as more sophisticated systems, as will be discussed.

Competence-related pay (CRP)

Competence-related pay is ‘a method of rewarding people wholly or partly by reference to the level of competence they demonstrate in carrying out their role’ (Armstrong, 2015). It involves an assessment of the application by the employee of the skills and knowledge required for the job. Assessing competence requires measurement of the impact that the application of employees’ knowledge and skills (illustrated by observed behaviours and actions) have on their performance.

Before competence can be used as a basis for paying people and/or pay progression, the organisation must have developed a ‘competency framework’ which identifies and defines the competency requirements for each role. Competences include knowledge and skills (capacity to perform the work) and personal attributes or required behaviours. The framework must also define levels of competency required for

each role and what will constitute evidence that an employee has reached the required competence level/s. Competency assessments then have to be related to individuals’ pay. In the private sector, competency-related pay systems usually involves the use of some form of ‘pay matrix’ which sets out the relationship between competencies assessed as achieved and the pay increase to be awarded.

It appears that CRP is not widely used in local government – where it is used, this is most likely to be as a system for pay progression in some or all grades/pay bands. The 2009 LGA workforce survey recorded its use by 20% of councils but covering only 2% of the workforce. As mentioned, 14% of authorities surveyed by the LGA in 2013 that had introduced a new pay progression system had opted for it. The latest figures do not distinguish between PRP and CRP but it can be assumed that of the 22% of respondents (England) using one or the other, the majority are probably using CRP (LGA, 2016).

In the UK overall, it is ‘much less popular than PRP’ (Armstrong, 2015). The drawbacks of CRP include:

- The problem of measurement – what has to be measured is complex as ‘competence’ involves personal attributes as well as ‘technical’ competencies (knowledge, skills), their application to the work and the impact this has on the employee’s performance.
- There can be a lack of clarity about what competences the organisation is paying for, and what is being assessed, and inconsistent application within the organisation.
- CRP systems are time consuming and expensive to develop and operate.
- They make huge demands on line managers.

From an equalities perspective, all pay systems which link pay increases to merit carry these risks:

- Scope for unfair treatment: Because CRP (and other forms of contingent pay) focus on the person doing the job (unlike incremental pay progression), they inevitably involve a degree of subjective judgement in assessing competence, thus there is more scope for individuals and particular groups of employees within the organisation to be assessed inconsistently.
- Potential for discrimination: Allied to the previous point, because CRP focuses on the person doing the job, there is a higher risk of discriminatory treatment and unequal pay outcomes.
- In theory at least, a key aim of CRP is to support continuous learning and development (L&D) opportunities for employees. Where there is a (genuine) learning culture in local government organisations, it is nevertheless highly questionable if they would have the resources to deliver continuous L&D for all staff and also reward competence-based progression

adequately and fairly.

- As with incremental progression, for budgetary and organisational reasons, there will be limits to CRP-related progression.

CRP could be floated or proposed as an option where employers want to move to a broad-graded or broad-banded structure, possibly using job families (discussed later). It could be attractive to organisations which have flattened their job hierarchies and/or shed groups of staff (through outsourcing, for example) and now employ predominantly 'knowledge workers' and professional staff, where deployment of their competencies is regarded as key to the success of the organisation.

Union representatives would be wise to be skeptical about the capacity of local government organisations to deliver CRP, and in particular, to ensure that most employees (and certainly those in low to middle graded jobs) would have equitable access to L&D. The latest statistics on gross training expenditure per employee in English authorities show that the median spend per employee in 2014/15 was £134. The median number of days of off-the-job training per employee was 0.8 (LGA, 2016). The published statistics are not broken down by occupational group but union representatives will know that for many frontline jobs, 'L&D' is mostly health and safety training.

Contribution-related pay

Contribution-related pay is a mixed model, combining elements of PRP and CRP. It assesses performance (what the employee achieves i.e. output or outcome) and how well they achieve it (demonstrating competency).

Progression depends on a combination of individual performance and improvements in individual competence.

Only 5% of respondents to the 2009 LGA workforce survey were using contribution-related pay (covering 2% of the workforce). More recently, the LGA has been promoting its use as part of its drive to encourage local authorities to 'review and refresh their reward strategies...to control employment costs in line with budgetary requirements' (LGA, 2012). It is also considered 'vital in the drive to improve productivity'. However, in regard to pay progression, a 2012 survey showed that 'clearly councils are looking for simplicity' (LGA, 2013). This is hardly surprising given the cost, disruption, uncertain gains and risks involved in implementing an alternative to incremental progression. Contribution-related pay is the most complex alternative system to administer.

How an individual employee's contribution relates to their pay depends on the type of grading and pay structure used. To give a local government

example, Buckinghamshire County Council has replaced increments with contribution-related pay. The mid-point of each grade represents the 'competent point' and the top of the grade is the 'advanced point'. Non-consolidated payments may be made above the 'advanced point'. If the performance of an employee at the 'competent point' is unsatisfactory, they do not receive an increase, so assuming annual uplifts in salaries, the following year, the value of their base pay will fall below the mid-point. (In theory, the pay of a persistent unsatisfactory performer could fall below the bottom (entry) point of the grade.)

More typically (outside local government) contribution-related pay is used in broad-banded structures (discussed later). There are different approaches to rewarding competence. For example, competence-related pay increases can be based on the performance ratings used in the organisation (from 'ineligible' to 'developing' etc. to 'exceptional') in combination with individual employees' position in the pay band (or zone within it). The percentage increases in pay to be awarded are set out in 'a pay matrix'. For example, using a pay matrix, where two employees are both rated as 'effective' performers, the lower paid employee might receive a larger percentage increase than the higher paid employee. (Employees whose performance is 'ineligible' receive no increase and, depending on the design of the pay matrix, those whose performance is rated as less than 'effective' may also receive a nil increase if their current pay is near the top end of the band.)

There may be more interest in contribution-related pay in organisations proposing to use broad-banded structures. These structures reject the use of incremental progression – they are intended to get away from a reward strategy based on so-called 'time-serving'. Also, with broad bands, owing to the width of bands, 'guaranteed' annual increases would be prohibitively expensive. However, reward management literature is replete with warnings that contribution-related pay only works if:

- Well designed competency frameworks are in place
- Outputs can be accurately measured
- There are fair and consistent methods of assessing competence and measuring output
- The organisation has the resources (including trained and supported line managers) to implement and operate the system effectively

Other criticisms (made above) of PRP and CRP also apply to contribution-related pay. In general, the national unions do not support this approach, believing that it is likely to lead to unfair discrimination.

Some local authorities have moved back to incremental progression because new systems have not delivered the expected results or are too

expensive to administer. Employers who are keen on alternatives to incremental pay progression should also note that ‘assessment-based progression systems cannot really drive cultural change but instead are best used to sustain and develop changes that have already been made through performance management etc.’ (LGA, 2013).

Hybrid systems

Hybrid systems combine elements of different pay progression systems, for example, using incremental progression for some pay points within a grade/pay band, but competence or performance related progression for the remainder. An example is the Agenda for Change pay system in the National Health Service, where there are competence-related gateway assessments for progression at the bottom and towards the top of the pay scale, but with standard incremental progression for the intervening points. There is also a performance-related element in that the top two points in some pay bands (at the top of the structure) are for ‘annually earned pay’.

To be acceptable, any method of progression needs to be transparent, fair and non-discriminatory, with clearly stated criteria for progression. Where the employer proposes a hybrid system, union representatives should ask the same types of searching questions outlined in the earlier section on PRP.

How many grades in the new structure?

Single status reviews

Single status pay and grading structures (in local authorities) usually have between ten to fifteen grades.

This number follows logically from the use of the JNC (or SJC) job evaluation schemes.

In the case of the NJC JES:

- The realistic range of total weighted scores is from 200-250 (because every job scores at least level one on every factor) to about 750-800 points for the full range of local government jobs up to but not including chief officer jobs (because no job scores at the top level on every factor).
- A recognisable difference in overall job demand would probably be represented by one Knowledge step plus one Initiative and Independence level plus one or two Responsibility levels. This is equivalent to around 50 points.

These features in combination suggest 10 to 15 grades of a width of 40 to 50 points.

A possible grading structure based on a rank order of evaluated local government jobs from a hypothetical council is set out at Table 1. These scores are intended to be reasonably realistic but they should not be used as a guide to what real jobs in local authorities with these job titles should score!

Local grading and pay reviews (post single status)

The impact of continuing austerity and the drive to ‘pay modernisation’ will influence employers’ thinking about the type of structures that will suit their organisation in the future. A ‘commissioning council’, for example, would be likely to want a different structure from a council that is committed to retaining in-house services. Private or voluntary sector employers operating in local government may want to extend their own existing pay structures to ex-local authority employees (See Part 2 on TUPE). Decisions over grading and pay can also be influenced by trends in HRM and ‘reward management’ and current practice in the wider public sector, for example, the use of role profiles in place of traditional job descriptions.

Some changes to traditional pay systems can have benefits for employees. They may also be accepted by unions for pragmatic reasons. However, some of the claims made by employers in support of ‘pay modernisation’ are highly questionable. These include the propositions that:

- ‘Time-served’ progression acts against improvements in productivity
- Narrow-graded JE-based structures are inherently unstable
- Job evaluation plays too dominant a role in determining individual employees’ pay
- Pay in local government organisations should be more closely aligned with market rates

The drive to reduce expenditure and the ‘direction of travel’ of employers’ thinking on reward strategy suggests that local employers will be encouraged to adopt alternatives to the typical ‘narrow-graded’ single status structures, which are discussed in a later section.

This has a direct bearing on the system of pay progression to be used. Other things being equal, the fewer the number of grades, the more likely it is that the organisation will wish to move away from traditional incremental scales. The arithmetic to demonstrate this is simple. If, for example, six grades are agreed to be sufficient, then this implies seven or eight spinal points per grade on the 44-point spine. If all employees have access to all these points through incremental progression, the resulting structure will be extremely expensive in the short to medium term. There is then an incentive to employers to restrict movement in

some way, such as making at least some part of the progression subject to assessment of performance or competence. However, as discussed earlier, it is possible for an employer to retain a narrow-graded structure and use an alternative progression system for some or all pay point in the grades.

Diagram 1 (see page 26) illustrates the different approaches.

To overlap or not to overlap pay scales

The obvious principle of a job evaluated pay structure is that more demanding jobs (with higher evaluation scores) should be paid more than the less demanding jobs in the grade below. This leads to the theoretical conclusion that pay scales or bands should not overlap.

In practice, pay scales often abut, that is, the maximum of the lower pay scale is the same spine point as the minimum of the next higher grade. This is generally tolerated on the basis of the argument that an individual on the maximum of the lower scale has several years experience, which probably means that they are doing work of equal value to a new starter in the higher grade.

In some structures, scales do not just abut but overlap. Diagram 2 shows abutting and overlapping scales.

Overlapping pay scales raise the problem of individuals doing work of greater weight (in JE terms) but potentially being paid less than colleagues in the lower grade. The problem is clearly more likely the greater the degree of overlap, as in broad-banded structures (see example D, Diagram 2). It carries an equal pay risk particularly where the disadvantaged group is predominantly female. (Moreover, overlaps could impact adversely on others with protected characteristics). A one point overlap is generally considered acceptable, as relatively few individuals will be disadvantaged in this way at any one time, and (if some other form of annual pay progression applies) only for one year. The employer may also take the view that initially the value to the organisation of employees entering the higher grade and new to their role is not significantly higher than that of employees at the top of the lower grade who are fully competent in their roles.

Our advice is not to have overlapping pay scales, but if this is absolutely necessary for other reasons, it is important to minimise the degree of overlap. If an equality impact assessment of the proposed structure reveals any significant equal pay differences and/or potential discriminatory impact, alternative options should be modelled. (See Part 2 on objective justification.) Aside from equality and equal pay considerations, permanent overlapping is likely to be seen as unfair by employees,

particularly if there are restricted opportunities for pay increases, promotion or career development.

The above advice relates to permanently overlapping pay scales. It does not necessarily preclude using overlapping scales as a temporary measure, as a means of phasing in a new structure. For example, in order to achieve a better pay structure, the overlapping points could be 'rolled up' on an annual basis so that they are eliminated over a limited period of time. However, phasing-in arrangements must be capable of being objectively justified by the employer where in effect they delay the immediate implementation of equal pay for women if (for example) previously higher paid groups of male employees with whom they are doing equal work are being protected from loss of earnings. (See Part 2 for more information on the legal position.) Also, great care needs to be taken to explain phasing-in arrangements fully and clearly and to secure the agreement of affected employees, particularly where female employees will not receive equal pay immediately as a result.

Diagram 1: relationship between numbers of grades and number of scale points



Diagram 2: relationship between numbers of grades and number of scale points

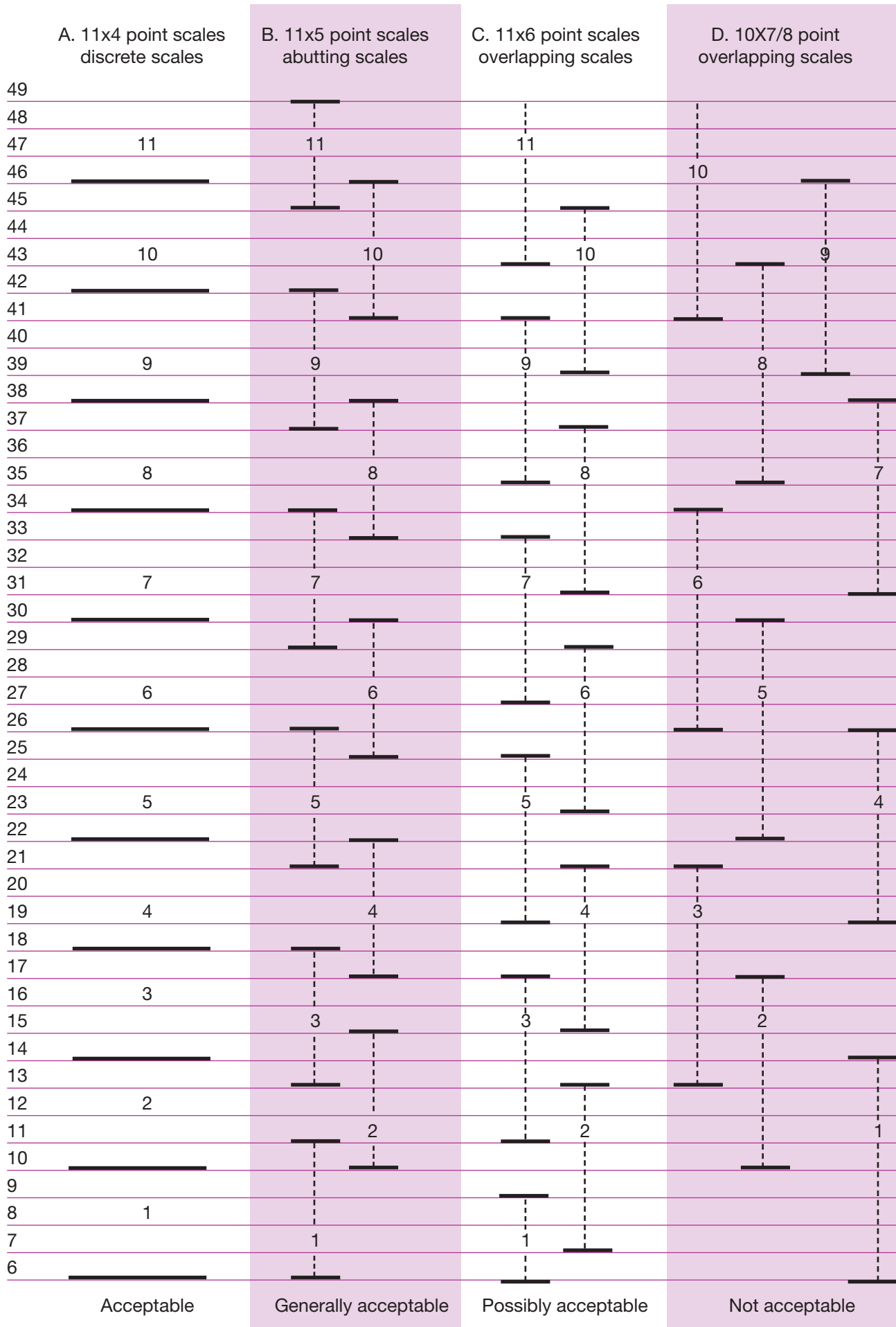


Table 1: A possible grading structure

JOB TITLE	JE POINTS	POSSIBLE GRADE
Head of Trading Standards	763	L
Estates Service Manager	747	L
Cleaning Services Manager	705	L
Pupil Support Manager	671	K
Catering Services Manager	666	K
Corporate Performance & Policy Advisor	656	K
IT Programme Manager	638	J
Senior Environmental Protection Officer	621	J
Procurement & Contract Manager	612	J
Trading Standards Officer	595	I
Principal Education Welfare Officer	587	I
Senior Accountant	581	I
Mechanical & Electrical Team Leader	555	I
Community Library Services Manager	544	H
Social Worker	537	H
Schools Software Support Analyst	526	H
Apprenticeship Team Leader	508	H
Social Worker Level 2	496	G
Environmental Protection Officer	492	G
Payroll Team Leader	452	G
Housing Grants Officer	450	G
Childcare Officer	446	F
Environmental Technician	440	F
Teaching Assistant Level 4	433	F
Senior Care Assistant	410	F
Residential Care Worker	401	F
Office Services Manager	393	E
Greenkeeper	388	E
Head Chef	387	E
Building Control Technician	387	E
Driver Loader	355	E
Administration Officer	351	E
Gardener	345	D
Finance & Admin Officer	344	D
Family Support Worker	344	D
Street Cleansing Operative	338	D
Caretaker Cleaner	331	D
Cook	322	D
Crèche Assistant	308	D
Library Assistant	295	C
Teaching Assistant Level 2	289	C
Data Inputter	285	C
Admin Assistant	285	C
Receptionist	279	C
School Crossing Patrol	270	B
Library Support Assistant	269	B
Clerical Assistant	269	B
Catering Assistant	269	B
Teaching Assistant Level 1	263	B
Centre Attendant	249	A
Cleaner	239	A

Local grading and pay reviews (post single status): Options that may be proposed by employers

Adopting or retaining a narrow-graded structure

Most single status grading and pay structures are 'narrow-graded' or 'multi-graded' structures. This means narrow in terms of the number of pay points in each grade. This is in contrast with broad-graded and broad-banded structures. These have fewer grades/bands and each grade/band has more pay points.

There are clear advantages for employers in using narrow grades:

- Alternative pay systems will be expensive to develop, implement and administer. A complete overhaul of grading and pay structures is a major undertaking not to be entered into lightly or rushed, particularly when, simultaneously, other major organisational changes are likely to be happening. The development and implementation of new pay systems will place substantial demands on line managers and specialist HR advisers who may have to be employed for the purpose.
- Narrow graded structures are relatively easy to manage
- Pay progression is restricted so the cost is more predictable and easier to control
- There is no guarantee that 'efficiency gains' or 'increased productivity' will result from the use of alternative grading and pay structures.
- Narrow graded structures are less prone to equal pay challenges (where equal-value JE has been used and the design of the structure and implementation has followed good practice guidance on equalities).
- Employment relations considerations:
 - Narrow graded structures are likely to be familiar to most employees (at least where they have worked in local government or the public sector) and union representatives.
 - These structures are transparent and largely trusted by employees. (The same might not apply to alternative systems).
 - A prolonged period of uncertainty over a new structure can be damaging to staff morale, especially when other organisational changes and cuts are taking place.
 - Pay systems that focus on individuals' performance, competence or contribution are more likely to generate grievances.

Weaknesses of narrow-graded structures

HRM textbooks will tell you that narrow graded structures suit hierarchical organisations, such as the traditional local authority. Proponents of alternative pay systems argue that narrow graded structures are not 'fit for purpose' in organisations which have flatter structures, job roles which are less rigidly defined, more team working, and fewer permanent and lifetime career jobs, i.e. the 21st century local government organisation.

As mentioned earlier, some of the textbook criticisms of narrow-graded structures are not supported by evidence from local government. An example of such criticisms is that they cause excessive 'grade drift'.

From the employee perspective, the main downside of narrow grades for employees is being stuck at the top of your grade with no place to go in terms of career development or earnings growth, other than upgrading or promotion. In theory, structures with broader grades or bands enable employees to make 'lateral career moves', broadening their experience or competency - although not necessarily increasing their pay. However, putting this into practice requires that the employer is committed to, and has sufficient resources for, employee learning and development on an equitable and non-discriminatory basis.

In regard to pay progression, in a broad-banded structure, employees could be no better off, and very possibly worse off over time, than in a narrow-graded structure, because bars to progression through the band will be put in place to control wage costs.

The impact of the National Living Wage

Payment of the non-statutory Living Wage and/or the National Living Wage (based on forecasted rates to 2020) raises issues and options as to how the increases can be afforded overall, and specifically, how pay increases can be accommodated within a pay system using narrow grades, which is the most common system used in local government. Initial advice is set out later in Part 1. At the time of writing, NJC talks on NLW implementation were at an early stage. Updated advice will be issued on the implications for local pay and grading structures.

The implementation of the National Living Wage could encourage more employers to consider alternatives to narrow graded structures, such as broad-graded structures, competency-related or contribution-related pay systems, or hybrid pay structures.

Broad-banded structures

Compared to a single status structure (with 10 to 15 grades), a broad-banded structure has far fewer 'bands' (grades), for example, four or five bands. The unions' view is these are not acceptable as jobs of greater job evaluation weight are placed in the same grade as those of lower JE weight.

Broad banding is said to suit delayed organisations; to support 'role flexibility', lateral career moves and internal labour mobility; and to allow for alternatives to traditional pay progression systems such as CRP, payment for contribution and payment for career development.

Jobs are defined in terms of 'generic roles'. Bands can be defined by generic definitions (relating to the roles in the organisation) or, more commonly, by reference to job evaluation points. Where jobs are placed in the band can be determined by the JE score, or the market rate for the role or cluster of related roles, or a combination of the two. Pay progression is never 'time-served' and usually not for performance alone (although cash bonuses may be used to reward high achievement). Progression can be 'lateral' i.e. along the band, when the employee's role expands or contribution exceeds the expected level. Vertical (i.e. upwards) progression is restricted to promotions or upgrades.

Broad banded structures have large overlaps between bands (up to 50% or more). The justification for this is said to be that the lower paid employees may deliver more 'added value' to the business than some higher paid employees.

It is important to note that the use of job evaluation is not a prerequisite for designing and operating broad banded structures. Where JE is used, it can be for these purposes:

- To define band boundaries (based on the JE scores of benchmark generic roles) and the relative size of bands
- To indicate where new roles should be placed within a band (although in private sector organisations, external relativities are likely to be more important i.e. what the market rate is for these roles. However, valid or reliable data on market rates may not be available.) JE can be used in conjunction with market rates to set 'reference points' within bands for positioning roles.
- To compare roles for equal value purposes.

The downside of broad banded structures

In theory, organisations with broad-banded structures have a strong commitment and culture which supports continuing development. Employees have dynamic roles (not fixed job descriptions) and are rewarded (financially and

non-financially) for being flexible and expanding their knowledge and competence by making lateral moves to other functions or business units. This can involve taking on a lower level role at no loss of pay on the basis that experience gained will enhance one's career prospects - the lower level role may have a better career path, for example. In reality, most local government organisations do not fit this picture and are unlikely to be in a position to reap the professed benefits of broad-banded structures.

In broad-banded structures, the focus is on paying the person rather than paying for the job. Responsibility for managing pay within bands is usually devolved to line managers to operate within their budgets and in line with corporate guidance.

From a managerial perspective, it is more difficult to manage and control salary costs with a broad-banded structure than with a narrow graded structure. Some organisations deal with this by having pay zones within bands to contain costs; in effect, re-creating grades (there being little difference between four bands each with three zones and 12 grades). It is an expensive system to administer. Broad banded structures can be very damaging to staff morale. In a climate of austerity and staff cuts, 'lateral moves' would most likely be used to plug gaps, without any real prospect of future career advancement. How individuals' pay is determined is less transparent. JE may not be used at all. If it is, it may not be clear how JE and market rates have been used in conjunction to set a 'reference point' within the band for their role. Compared with equal value-based narrow grades, broad-banded structures are more open to equal pay challenges. For these reasons, broad banding has never been used extensively in the UK public sector, although it was adopted for a time in some civil service agencies such as the former Inland Revenue.

Broad-graded structures

Broad-graded structures combine features from narrow-graded and broad-banded structures in an attempt to get the best of both worlds. Typically, they have fewer grades than narrow-graded structures (such as 10-15 grade single status structures) but not as few as broad-banded structures.

A broad-graded structure would have six to nine grades but with wider pay ranges per grade than multi-graded (narrow) structures. Pay progression is controlled as in narrow-graded structures, but because each grade has a wider pay span, there has to be a mechanism in place to ensure all staff do not inevitably reach its upper limit. As with broad-banding, 'close attention is paid to market rates in establishing pay ranges and fixing salary levels' (Armstrong, 2015).

The main advantages claimed for broad-graded structures are that:

- They overcome the problem of grade drift (for many employees, achieving a higher rate of pay will not necessitate having to go up a grade)
- They allow for more accurate 'job matching' to role profiles (than in broad-banded structures) They are less costly to implement than narrow-graded structures because fewer employees are likely to be at the top of their broader grade and (assuming pay progression is controlled) they will not all reach the top point.

However, their use to date in the UK seems to be mainly by organisations that link pay to market rates. For example, at the time of writing Camelot has a six-band structure based on job families (for instance, Bands A&B is designated for administrative support and IT jobs; Band F covers functional directors.) Base pay is set at the median market rate for each job and each job has its own pay range within its band. Salaries are benchmarked against market rates twice a year. This structure would not suit a large organisation with a more diverse range of occupations or one which is not so market-focussed. It also raises questions about equal pay.

There is nothing to prevent a broad-graded structure being based on job evaluation but it is unlikely, for cost reasons, that employers would agree to pay progression solely or mainly on an annual incremental basis.

Job family structures

In job family structures, jobs with similar functions or occupations are grouped together. They are related through the activities carried out and the basic knowledge and skills required. There are usually six to eight levels within each family, reflecting the different levels of knowledge, skill, responsibility or competency required. There can be separate pay structures for different families. Some families, for example, might be treated as 'market groups' and paid differently from others. The levels in job families can also form the basis of career paths (see below).

The unions are cautious about the use of generic job family role profiles. This is when generic job families and profiles are constructed and then evaluated rather than profiles being developed based on existing job information, evaluated and then used for matching purposes.

Examples of different bases for job family groupings include:

- Functions – for example, sales, finance, marketing, IT
- Generic roles – administration, professional, team leaders, heads of department

- Discipline or specialty-based – scientists, engineers, accountants
- Hierarchical – for example, by region and branch

Job families can be incorporated within broad bands. Career progression can be vertical (within the employee's job family), lateral (movement across to a related job family) or diagonal (promotion into another job family).

In local government organisations, the 'market model' of job families (with separate pay structures for different families) would invite equal pay problems.

We would strongly advise against having separate 'market rate groups' in a job family structure. In roles or occupations where it is difficult to recruit or retain staff, there are other solutions available (such as the payment of labour market supplements).

With grading and pay structures based on job families, job evaluation should be used to determine levels within and across families, just as it would be used to determine grade boundaries. The number of levels in each family could vary (depending on the range of JE scores for the jobs within the family) but a common pay structure should apply to all job families.

Career-grade structures

It is helpful to distinguish 'career-grade structures' from job families in general. A variation of a job family structure, this system involves the use of a common pay structure across all job families (rather than operating separate pay structures for each family). This reflects a greater emphasis within the organisation on career paths and career progression than a narrower focus on pay.

Levels within job families can be defined using job evaluation. Where competency-related pay progression is used, a competency framework (based on or drawn from the JE scheme factor plan) can be mapped onto the grading structure to provide career pathways. (The competency framework shows the level of competency required to progress to the next level.) The NHS Knowledge and Skills Framework for Pay Review Body staff is an example.

Within the NHS, the job family approach is used in conjunction with a hybrid pay system (incremental plus competence-related progression) not market rates of pay.

It should be noted that career-graded structures are not the sole preserve of job family structures. It is possible to have career pathways with job evaluated narrow-graded structures, and, as mentioned, the JETWG has developed advisory role profiles to assist in creating or updating career pathways for some groups of related jobs. However, in the context of future local reviews, it

is likely that local government organisations will want to relate career progression to a competency-related pay system or a hybrid pay system that incorporates an element of competency-related or contribution-related pay progression.

The pre-single status (UK) national agreement for APT&C staff (the Purple Book) allowed for 'career grades' in certain occupations. (For more information, see the 2005 Guide.) However, equal pay issues arose where employees had moved up the career ladder but the associated pay increases they received were not matched by commensurate increases in job demands (in JE terms). This problem can be (and have been) overcome and career grades are capable of being adapted to suit a single status structure. For more information, see Part 4.9 of the Green Book and NJC JE Technical Notes 7 and 11.

Living Wages and local pay and grading structures

Introduction

Union guidance in respect of campaigning and bargaining for the payment of the non-statutory Living Wage emphasises these general principles:

- The Living Wage should be implemented by agreement with the trade unions (not by unilateral action on the part of the employer)
- The rate should not be a locally negotiated 'living wage'. It should be the national rate (set by Loughborough University and GLA Economics) with London weighting (for England) and the national rate for Scotland
- A Living Wage should not be funded by cuts to services or terms and conditions
- A Living Wage should not result in job losses
- A Living Wage should not undermine equal pay-based pay structures

At the time of writing, the most common approach to paying the Living Wage (and since 1 April 2016) the National Living Wage in local government has been to raise the lowest rates of pay to the requisite Living Wage amount, usually paid as a cash supplement to base pay, with no changes being made to the pay structure itself. However, as the National Living Wage is expected to rise to £9.02 - £9.35 per hour by 2020, pressures are likely to build for changes to be made to local structures, and as mentioned earlier, the NJC is entering talks on the implications for the NJC pay spine.

The impact of the Living Wage and NLW on individual organisations will depend on a host of factors, including the composition of the workforce. For instance, implementation costs will obviously be different in organisations which no longer provide some services or have outsourced services in which low paid workers predominate compared to organisations that maintain in-house services. There will still, however, be implications for contract costs.

Implementation costs will be different for an organisation which has a high proportion of permanent part-time staff on NLW rates compared to an employer using a high proportion of in-house zero hours contract workers or other forms of casual (or agency) worker.

As indicated above, affordability is the key concern of most employers and, based on survey evidence of UK employers' intentions, these are the main options being considered or acted on:

- Reducing or ending overtime payments (mainly for new starters)
- Reducing working time

- Minimising the hiring of workers aged over 25 (or substituting over-25s with younger workers), or using agencies which engage under-25s workers
- Cutting 'non-essential' services and staff

In local government, it can be expected that some employers will seek further reductions in Part 3 Green Book/ Red Book terms and conditions, which are discussed elsewhere in this guide. In terms of possible changes to pay and grading structures, the position is not yet clear and the evidence to date is that employers' responses are mixed, depending on local circumstances. The main options are outlined below.

Absorb the NLW increases and make no changes to the pay of other staff or to the local grading and pay structure.

This could be described as the 'suck it and see' option. It is based on the view that staff above NLW rates of pay will feel that they are still paid fairly and will not be concerned about the erosion of differentials. The 'differential' is the difference in pay between one grade and another. Technically, this is usually measured on the basis of the percentage difference between the midpoint of the lower salary range and the mid-point of the higher salary range.

This option is highly unlikely to be sustainable in the medium term. While this option might appear viable for small organisations, irrespective of size, it does not make business sense not to plan for future eventualities, including the risk of losing valued staff who could be attracted to work for other employers paying higher rates.

Pass on a proportion of the NLW increase to employees in the pay range immediately above the NLW rate, by a percentage or flat rate amount.

This relieves some of the compression of differentials. This option has some attractions – it could contain implementation costs because increases are restricted to part of the pay structure and, in the short term, it addresses the most pressing problems in regard to differentials. But it is not targeted at staff whom the organisation may have difficulty in recruiting or retaining, so it would not solve that problem. It also leaves unresolved the problem that employees doing work with different levels of demand are being paid as if they were doing work rated as equivalent.

Pay labour market supplements (LMS) to specific roles in the pay range immediately above the NLW pay rates where labour market data shows that their existing base pay will be uncompetitive.

These roles will most likely already be hard-to-fill or retain or be otherwise 'valued' by the organisation. Labour market supplements have a legitimate role to play in dealing with genuine recruitment/retention pressures in the short term (see the later section in guide). But they should not be used as a device to 'manage' the implementation of the NLW.

A proliferation of different pay for jobs rated as equivalent could undermine the job-evaluated basis for grading, as well as create significant administrative work such as identifying and tracking relevant labour market rates and assessing applications for LMS payments. Even if the use of labour market supplements is limited, it may solve one problem but leave others unsolved, particularly the issue of compressed differentials for posts which do not attract LMS payments. It may prove more costly than anticipated. This approach also entails equal pay and equality risks.

Eliminate or narrow differential compression by redesigning the jobs of employees paid the NLW so that the demands of these jobs (in JE terms) equate to the demands and pay of the originally higher graded jobs.

The focus is on raising productivity to meet NLW implementation costs, instead of making efficiency savings. While this option has the advantage of maintaining the relationship between job demands and grading, it may not be feasible on any scale – the organisation has to have a genuine need for redesigned roles and a much reduced need for the original roles.

Using job redesign artificially to justify upgrading does not make business sense. In a single status context, it has been held to be discriminatory where the real reason for job redesign was to maintain the earnings of groups of male ex-manual workers who would otherwise have been downgraded - see Part 2. This option could involve additional spending on training and development of employees to enable them to undertake the new roles competently. It might be better suited to a pay structure which uses competency-related progression for some or all pay points within the pay band/s.

Maintain differentials or reduce compression of differentials in respect of posts in grades which will be particularly impacted by NLW implementation

Like the previous option, the emphasis is on raising productivity and it is similar, except that it focuses on the posts affected by compression. In this case, job redesign would apply, where appropriate, to those posts. Increasing the job demands (in JE terms) would then justify uplifting the salary.

Again, there would need to be a genuine need on the part of the organisation for these (selected) jobs to be redesigned, and the same caveats and drawbacks apply to this as to the previous option. However, there may be genuinely more scope to redesign jobs at supervisory level (for example) than currently lower graded jobs. With internal restructuring and de-layering at management level, more responsibilities are being devolved to front-line managers and supervisors. If re-evaluated, some of these posts could qualify for upgrading in any event.

A potential problem could be the 'knock on' effect, as currently higher graded employees press to restore their differential - the likelihood and scale of this would need to be assessed. Arguably, this option also lends itself to competency, or contribution-related pay structures and a move away from narrow grades with incremental progression to broad-graded structures, or (perhaps more palatable to the unions) hybrid pay systems.

These are just a few examples of options that could be proposed by employers. There are many possible variations of them.

Equality impact assessment

Any proposal to accommodate the implementation of the Living Wage (be it the voluntary Living Wage or NLW) or package of measures must be equality impact assessed before it is finalised. If amendments or adjustments are made, these should also be impact assessed before an offer is put to members or agreed by the union.

The options above do not include altering the NJC/SJC pay spines. Union representatives should report any proposals or unilateral moves by local employers to alter the pay spine to their regional office.

Developing grading and pay structures

The pay modelling process

Pay modelling refers to the process of producing and costing (modelling) different options for the design of the new (or revised) grading and pay structure. This can be done using Excel (or similar programmes) in small organisations but larger employers are advised to use pay modelling software such as ResourceLink.

Besides efficiency, regardless of size, the advantages to the employer of using pay modelling software include having:

- Accurate costings for the salary package, including on-costs (employer National Insurance, pension contributions etc.), because data from most payroll systems can be downloaded into the pay modelling software system
- Reasonably accurate cost estimates for future years, on the basis of assumptions about turnover and pay progression. Such estimates are important because grading and pay structure proposals which are low cost in year one may be high cost in the medium term (where there are pay progression opportunities for most employees) and vice versa (where pay scales are short and/or pay progression opportunities restricted).
- Accurate costings for workforce development
- The ability to restrict options to be modelled up to a total cost ceiling. The employer needs to be asked whether they have built in a maximum cost parameter and if so what it is.

A maximum cost parameter will exclude all options that cost even £1 more. It is usually advisable for the employer to set any cost parameter a little higher than the stipulated resource ceiling. This allows more seemingly expensive options to be modeled which may be preferable taking other criteria into account, such as minimising the number of employees to be 'red circled'.

Union involvement in pay modelling

It is strongly advisable for union representatives to be involved in pay modelling. The employer will probably set up a team to do this. We recommend that it should include an equal number of management and union representatives. They need not be branch representatives or regional officers – they could be interested activists or members with some IT skills – although high levels of skill are not required. The key requirement is that union representatives receive training so that they can understand the pay modelling process and interpret the results. They should also have had prior union

training relating to job evaluation and undertaking local grading and pay reviews.

During the initial single status reviews, some local authorities agreed that union nominees could participate in the same pay modelling software training as the employer nominees, so that they could both operate the software system.

Whether or not union nominees undertake the full training programme, union representatives and negotiators should request a presentation and briefing session on the pay modelling software to be used, in order to understand the pay modelling process, get a feel for what the software can do, ask the right questions and get the best out of the system.

Modern pay modelling software is very user friendly. Options in scattergram format can be projected onto a large screen and variations (for example, changes to JE grade ranges or boundaries) modeled by simply moving the cursor. Observations on the screen can be highlighted so that you can see which jobs are falling outside possible grade and salary ranges. It is more important to be able to suggest alternatives or variations than it is to be able to actually operate the system.

It is generally in the interests of union members for it to be possible to test a wide range of options and variations to grading and pay structure proposals, in order to ascertain the most advantageous/least disadvantageous. It is also helpful for union representatives to be able to consider the future cost estimates, as this could help identify situations where the employer is using the grading and pay review to make future pay bill savings, even where the immediate costs seem quite high.

There are an infinite number of grading and pay structure options. Most will be agreed by the employer and unions to be inappropriate or otherwise unacceptable, but if unions have been involved in the process, they will be able to reassure members that this is the case. Where there is a consensus as to the best option, the advantage to the employer of involving union representatives is that they will be able to confirm to members that it is the best that can be achieved.

Stages in the pay modelling process

The number of options for consideration will be much reduced if some basic principles have been agreed before pay modelling commences, for instance:

- Is the new grading and pay structure to be based on the NJC/SJC pay spines? The expected answer is 'yes'. This would include employers that have voluntarily added points to the top of the spines.
- In broad terms, how many grades would provide a sensible structure for the needs of the organisation? Most employers look to have fewer grades because structures are flatter and organisations less hierarchical than was historically the case. Between 9 and 12 is a good starting point for narrow-graded structures.
- Will the new salary structure be based on flat (spot) rates or incremental scales? If, as is likely, the agreed option is incremental scales, it is recommended that each scale should not have more than 6 incremental points, that is, minimum/entry point plus 5 incremental steps. (The discriminatory risks of having long scales are discussed in other sections of this guide.)
- Will pay progression be on the basis of annual increments, or is the employer proposing an alternative approach, such as competence or performance related pay progression? This is an important question, as it affects the assumptions built into the pay modelling software for future estimate.

Before pay modelling can be fully undertaken, certain data will be required (for use by the pay modelling software):

- A job evaluation score for every employee to be covered by the grading and pay structure proposals
- Current full-time equivalent (FTE) salary. This should preferably be the actual salary, if this can be downloaded from the payroll system, otherwise an assumed salary, either maximum or midpoint of current salary scale
- Actual or assumed salary and hours of work
- If terms and conditions of employment are changing, basic and additional pay information
- Sex and age (and if possible, ethnicity and disability) of employees to be covered
- Other useful distinguishers to help in checking options, for example, department or directorate, so that the grading structure for related jobs can be reviewed.

The main parameters of the system, any of which can provide a starting point for pay modelling, are:

- Number of grades
- Job evaluation grade ranges (You can get some idea about where breaks might fall from reviewing the JE outcomes spreadsheet)
- Salary ranges - often based on spine scale points
- Cost
- Numbers of winners - identified as 'green circles' on the visual scattergram - and losers - 'red circles'

Realistically, it is probably sensible to start with the number of grades or, if breaks in the rank order of evaluated jobs are clear, job evaluation ranges.

It can be useful to model the possible extremes, that is, a model where there are no losers, which will almost certainly be too expensive to be viable and one which carries nil cost in year one. This approach will almost certainly mean more red circles than any of the stakeholders are willing to contemplate. However, these options will give the extremes in terms of costs and red and green circles, and thus provide a framework for subsequent discussions and modelling.

Once the negotiators have an idea of what maximum and minimum cost options might look like, further modelling can be done on the realistic options. This involves identifying potential improvements to the basic framework by testing, for instance:

- Larger and smaller numbers of grades within the preferred range
- Modifications to the JE grade boundaries. This can be often be done by moving the screen cursor to where there appear to be visual breaks in the clusters of outcomes.
- Modifications to the length or position of pay scales. Lengthening the pay scales may reduce the year one costs because more employees will assimilate on their current salaries, but may increase future costs, if this increases progression opportunities
- Different cost ceilings, or numbers of red and green circles

As the modelling progresses, it is sensible to check the impact of serious options on a departmental or job family basis. (Here 'job family' means the same/very similar occupations undertaken in different parts of the organisation.) If the pay modelling appears to be giving perverse outcomes, this is probably because there are inconsistencies in the job evaluation outcomes. If this is so, pay modelling should cease until a further JE consistency check has been undertaken (see NJC guidance on job evaluation and NJC Technical Note 14: Consistency Checking).

Once the options have been narrowed to one or two preferred options, the data in the pay modelling system can be used to carry out an equality impact assessment on the basic grading and pay structure proposals. (See the later section.) The data can be used to calculate the average basic pay of male and female (full-time-equivalent) employees in each of the proposed grades (i.e. where men and women are doing equal work) in order to check for equal pay 'gaps' (i.e. statistically significant differences). This information can also be used to show what the equal pay differences are under the existing pay arrangements.

In effect, this is the equivalent of doing an equal pay audit. Comparing the two sets of results grade by grade, it can be seen whether, and to what extent, the proposed structure will narrow any significant equal pay gaps. The same comparison should also be done on the basis of average total earnings of male and female FTEs, as this is often where significant gaps are revealed. (See the section on equal pay audits and equality impact assessment for more information and next steps.)

Under- valued and over-valued jobs

A job evaluation exercise will reveal jobs that are 'under-valued' and 'over-valued'. Where an equal value-based job evaluation scheme has been used, under-valued jobs are jobs which are currently paid less than other jobs with the same JE score. The reverse applies to over-valued jobs.

The initial single status reviews showed that many organisations had a sizeable minority of relatively under-valued jobs. This was the case where:

- local authorities had significant numbers of ex-manual jobs which were known to have been under-graded (for example, home carers whose job demands had grown over time), and
- in authorities with large social services departments and other client-related services, such as leisure, education and housing, where there had been no equal pay audits or equal value claims.

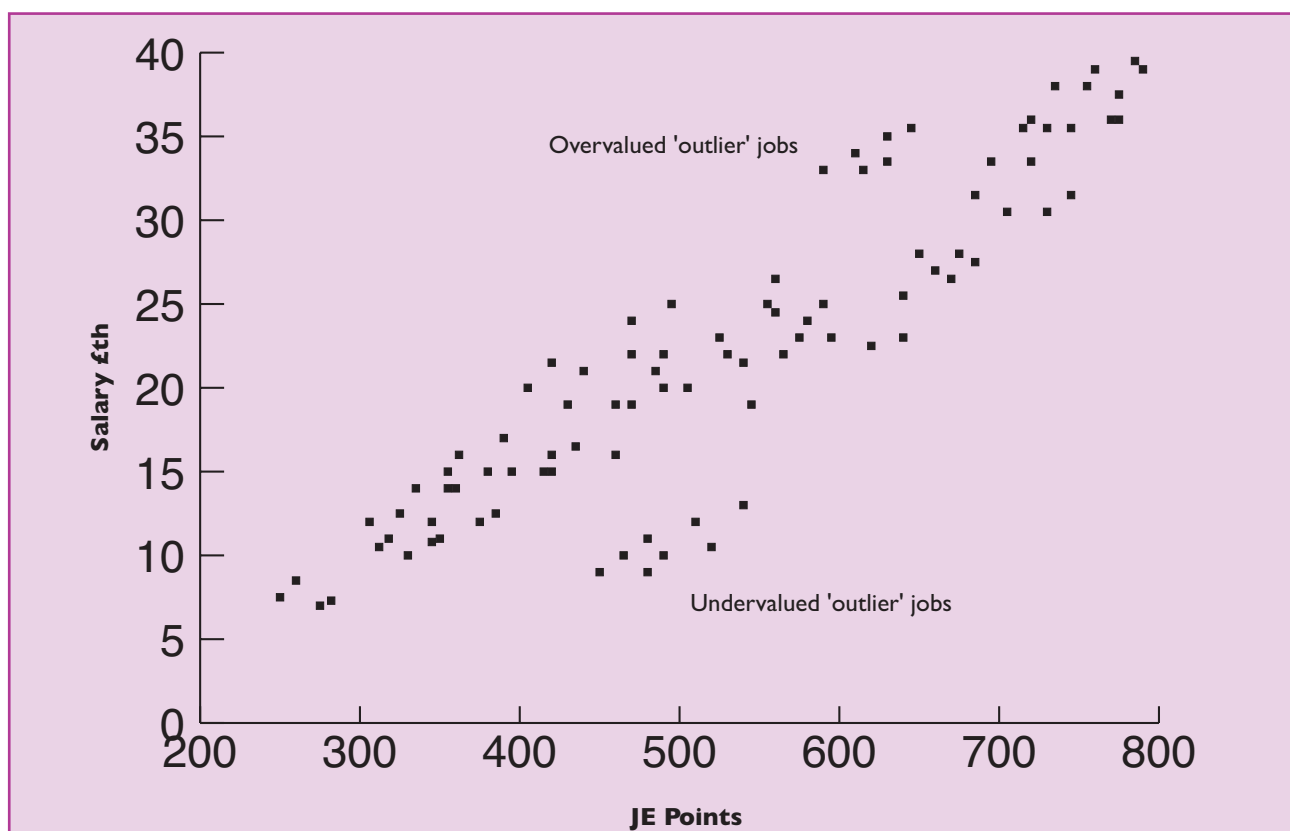
Some authorities had a significant minority of jobs that had been well-graded by comparison with the majority owing mainly to past grading decisions having been made in an unsystematic and inconsistent manner over time.

Post single status implementation, it is difficult to predict the extent future JE exercises might reveal under and over-valued jobs. It could be more of an issue with private or third sector employers in local government than with shared service arrangements between local authorities that had implemented single status. Nevertheless, bringing employers together from different organisations may reveal anomalies (as is discussed in the later section on shared services).

During pay modelling, the extent of outlying jobs can easily be identified by plotting job evaluation results against previous salaries including any bonus payment and then multiplying the outlying jobs by the number of employees covered by the relevant job evaluations. Do not include overtime or unsocial hours payments for this purpose. A pay modelling system can do this automatically and if suitably programmed, can identify which of the under- and over-valued jobs are male- or female-dominated. Diagram 3 shows a scattergram with both undervalued and over-valued outlying jobs.

If there are proposed changes to premia payments, these should be taken into account separately during the pay modelling process, in assessing ongoing costs.

Diagram 3: Scattergram of je points against previous salaries, showing outlier



Don't let the tail wag the dog

The following examples of 'letting the tail wag the dog' are drawn from the experience of the single status reviews. However, they describe management techniques which can be deployed in any local review, although the circumstances may be different.

Lowering the payline

Moving all historically under-valued jobs to the correct equal pay level at the date of implementation of the new structure, while protecting relatively over-graded jobs, can be expensive. The classic management response to this is to lower the payline.

The most extreme approach is to lower salaries generally to pay for the increases. This involves calculating what reduction in salaries across the board ('lowering the previous payline') would be necessary. More commonly, it involves a calculation of the reduction in salaries at particular parts of the structure to give an overall nil, or minimal, cost outcome ('altering the payline slope or gradient'). Both scenarios are examples of allowing the future pay structure (the dog) to be determined (wagged) by initial implementation issues (the tail).

Lowering the payline is inappropriate and short-sighted, for the following reasons:

- Unless salaries can be shown to be above market rates generally, which is unlikely, lowering the payline will result in recruitment difficulties in the short to medium term. Organisations could be forced to rely on the payment of labour market supplements to offer competitive salaries. This will be expensive. (See the later section on labour market supplements.)
- There may be 'leap-frogging' of staff between jobs in neighbouring organisations because pay is better (or worse) if there are several rival employers in a relatively small geographical area. This creates retention problems, is destabilising, potentially expensive and will affect morale of remaining staff.
- Lowering the payline will demoralise affected staff, be seen as unjust, and possibly give rise to grievances, disputes and legal claims such as breach of contract, unlawful deductions from wages and constructive dismissal.
- Lowering the slope or gradient so that particular groups are disadvantaged raises the risk of equal pay challenges, for example, where the pay of female-predominant administrative and clerical jobs is reduced, but not jobs mainly occupied by men doing equal work. The argument that the women's jobs were paid above the market rate would be unlikely to succeed if cost alone was found to be the reason for the difference in pay.

It is important to remember that in order to achieve equal pay, the law requires women's pay to be raised to the level of their male comparators where they are doing equal work. (This is explained in Part 2.)

Broad banding

As a cost containment technique, broad banding involves setting overlapping, wide pay scale boundaries to accommodate all or most of the historical salaries and then assimilating employees at their previous salary levels (except for extreme outliers, whose salaries are increased to the minimum of the broad band). This option can look attractive to employers as it appears to avoid lowering the payline but provides a minimum cost approach to the introduction of a new pay system, because, in the first instance, the great majority of employees remain on their previous salaries.

However, from a local government perspective, there are a number of problems:

- Because broad banding involves wide salary ranges, it is inevitably associated with a mechanism to restrict movement up the salary scale, for example, performance or competence related pay, or the introduction of qualifications or other barriers to progression. If these mechanisms are applied rigorously, they become another way of lowering the pay line through the back door, and have all the same disadvantages
- Broad banding is associated with much more line management discretion than has historically been the case in local government, in relation to progression within the band and to the positioning of new recruits on the relevant scale.
- There is a real risk of perpetuating unequal pay between female dominated jobs (often assimilated towards the bottom of the broad band because of their historically lower pay) and male dominated jobs (more likely to be assimilated in the middle or towards the top of the band), unless there is a specific mechanism for movement towards equal pay, i.e. pay increases weighted towards those in the bottom section of the pay band.
- There may also be equal pay issues in relation to those in a higher evaluated band being paid less than those towards the top (perhaps for historical reasons only, unrelated to experience or performance) of the lower band.

As discussed earlier, broad banding – used in the private sector and the civil service in the 1990's – has fallen out of favour in reward management circles. Instead, employers could propose using **broad-graded** structures. Whatever the stated motivation for wanting to adopt a broad-graded structure, its use as a means of controlling implementation costs raises the same issues outlined above in respect of broad banding.

Partial implementation

In order to limit costs, some local authority employers proposed implementing single status only for certain groups of employees, generally ex-manual workers and employees in the lower ex-APT&C. grades, perhaps up to old scale 3 or 4. Sometimes this was put forward as the first stage of implementation, with other groups of employees to follow at a later date. While this might have been presented as a practical implementation issue, it was more likely to have cost-containment motives.

Partial implementation, affecting the above or other groups, could be proposed in the context of current local grading and pay reviews. Whatever the arguments used, it remains a high risk strategy for union representatives as well as for employers, for the following reasons:

- It assumes that all the jobs to be covered by the partial implementation are less demanding than all other jobs (for example, that no ex-manual jobs are as demanding as jobs above the cut off grade). While it may be generally true, there are likely to be some exceptions and these could give rise to equal pay claims.
- It does not deal with equal value issues among the jobs excluded from the partial implementation, which could also give rise to equal pay claims
- It places an artificial ceiling on the exercise, which could give rise to appeals and grievances, not necessarily equality related, at a later date.

Phasing in

An alternative to the previous options is to develop an appropriate and acceptable grading and pay structure covering all employees and then to devise a method of phasing in any pay increases to spread the cost. Employers may be attracted to phasing in for this reason and obviously this is likely to be an acceptable option to members concerned about cuts to terms and conditions and/or services to 'pay for' the new structure. (See Part 2 on the law and victimisation by employers.) Crucially, it also avoids the outlier issue (tail) from determining (wagging) the nature of the pay structure (dog).

There are a number of possible methods to phasing in, for example:

- Green circling: The difference between the actual salary and the minimum point of the appropriate scale for the job is divided by an agreed number of years (usually two or three), with affected employees receiving half or a third of the difference each year (in addition to any annual settlements) until they reach the correct salary scale. This approach would be particularly suitable if a fixed (flat) rate pay structure is adopted.
- Rolling up incremental points: Overlapping

incremental scales are introduced initially, wide enough to accommodate the previous salaries of all or most employees. Each year one increment is then 'rolled up' (eliminated), as employees on that point move up incrementally, until the agreed number of increments per scale is reached. If this approach requires long scales, it might be necessary to give double increments to those on the bottom point and 'roll up' two increments per year so that phasing-in is completed within a reasonable timescale.

- Transitional zones: This is a variation on the above, involving a four point 'transitional' zone below each of the agreed three or four point substantive scales, to allow (accelerated) incremental movement towards the substantive scale for the job. In this option, those below the transitional zone move immediately to the minimum point of that zone, generating an immediate cost, but regulating the transition period to an agreed number of years.

It is important that members give their consent to phasing in by voting in favour of it and that, prior to a ballot, it is fully explained so that they understand how it would affect them as individuals. There is no statutory guidance on an acceptable period for phasing in a new grading and pay structure to achieve equal pay. Technically, members entitled to equal pay could take a claim during the phasing in period because during that time they are not receiving equal pay for equal work. However, if this is genuinely a time-limited, transitory arrangement, designed to enable equal pay to be achieved, and it has the support of the majority of members, it minimises the risk of a successful legal challenge.

Phasing in should occur over a short timescale – ideally one or two years, so that affected employees can see exactly when they will be paid on the correct scale for their jobs. It should also be remembered that acceptable transitory arrangements do not cancel out entitlement to compensation (back pay) for past pay inequality. This issue is discussed in a later section of the guide.

Proposals to phase in the new structure in ways that would exclude certain under-paid groups for long periods should be rejected, as this could give rise to equal pay claims. Phasing in arrangements should treat all employees equitably and not be used as a form of partial implementation of single status. (Also see the earlier advice on overlapping pay scales and Part 2 on pay protection.)

Pay protection

Pay protection is the practice of protecting the pay of employees whose jobs are downgraded. This can be the result of:

- an internal reorganisation or reconfiguration of services

- the implementation of a new JE scheme
- a local grading and pay review
- TUPE transfer

In any job evaluation exercise, there will be some employees whose jobs will have evaluated at a lower level relative to other jobs than indicated by their previous salaries. This happens when the overall demand of jobs, relative to others in the organisation, has decreased. This could be as a result of reorganisation of work or the introduction of new working methods or equipment, or because the starting salary for the post was set at a level which was out of line with similarly demanding jobs.

The two key issues for union negotiators in relation to protection are, firstly, to ensure that protection arrangements will be agreed; and secondly, that protection arrangements are not discriminatory.

Single Status reviews

In the case of single status reviews (in England, Wales and Northern Ireland), the 1997 Implementation Agreement of the Green Book still applies. Paragraph 12.2 states 'in conjunction with local grading reviews the authority and the unions shall agree the terms on which there should be protection against loss of remuneration'. The 2004 NJC Implementation Agreement also specified that 'local pay and grading reviews should include proposals for protection'.

The SJC agreement provided for protection at assimilation onto the new spinal column point for all employees, including bonus earners, for three years' protection on a cash conserved basis. This means that the occupier of a down-graded post would receive the cash value of their pre-review earnings (wages/salary plus allowances and bonus) for three years, but no SJC pay awards or incremental progression in that period. At the end of three years, the post moves onto the 'correct' spinal column point for the job (as evaluated and graded by the review) but at the current basic pay for that spinal column point (i.e. as uplifted by SJC pay awards over the past three years).

Other local grading and pay reviews

Protection arrangements should also be agreed in respect of any other local grading and pay reviews. This is a matter of fairness and good employment relations. It also makes business sense (as reducing pay can cause employers to lose affected staff). Generally, it is advisable to agree the principle that protection will apply and the framework for a protection agreement, then to negotiate on the detail once the likely outcome of the review is clearer.

The potential number of employees who may be downgraded will emerge during the pay modelling process (discussed earlier). If large numbers are

involved, it suggests that there could be flaws in the JE exercise or (more likely) the employer is lowering the payline. Normally, the number of employees to be protected should not be large. It is not true that there is a formula for this, such as 'one-third goes up, one-third goes down, and one-third stays the same'.

In some single status reviews, the protection of bonus earnings was a major issue which (in some instances) was only resolved following legal action. With the demise of traditional manual workers' bonus schemes, this should be an historical issue which should not reoccur. The problem related to protection of bonus paid mainly to male ex-manual workers doing equal work with women who (for a number of reasons) did not receive bonuses, where the men's bonus had long ceased to be a real productivity payment. In a minority of the legal cases, the payment (and protection) of bonus was held to be objectively justifiable and not unlawful (see Part 2). This illustrates the point that genuine performance-related pay is not necessarily discriminatory or unlawful. (See the guidance on equality impact assessment and equal pay audits for more information.)

Protection in reconfigured or shared services

Note: Local grading and pay reviews in reconfigured organisations are covered in more detail in a later section – it would be advisable to read that first before the following paragraphs which deal only with protection.

When a grading and pay review is being planned in a 'new' organisation (i.e. with reconfigured service arrangements) and protection arrangements are being discussed, it will be necessary to check whether the constituent organisations have differing pay protection arrangements. These need to be reviewed at an early stage to ensure that they meet current legal requirements. Harmonised protection arrangements should be agreed for employees not covered by TUPE.

Where TUPE or TUPE-like transfers apply, employees transferring to a new employer will have their terms and conditions of employment protected (including any current pay protection). This could mean that employees from different previous employers are doing equal work but are paid differently. TUPE can be a material factor defence to an equal pay claim as a TUPE transfer is not a sex-based reason for the pay difference.

However, the 'TUPE defence' will not apply to new recruits to the organisation who did not transfer in under TUPE. Nor will it apply where a TUPE-transferred employee voluntarily chooses to take up a different post in the organisation on a different rate of pay, or, where under an employer restructuring (of a type that is permitted under

TUPE), transferred employees are moved to new posts and different terms and conditions. (See the later section on shared service arrangements and Part 2 on TUPE.)

Non-discriminatory pay protection

The outcomes of local reviews based on job evaluation are not safe from legal challenge if the design of the grading and pay structure and/or its implementation is indirectly discriminatory. As mentioned above, this was an issue in the past in relation to some protection arrangements which could not be objectively justified. Post single status, there may be a view that, in future, pay structures in local government will not be so susceptible to equal pay or discrimination challenges – historic sex-based pay discrimination has been dealt and is unlikely to recur on the same scale. Be that as it may, enduring occupational segregation means that future reviews could potentially impact adversely on one sex (most likely women), as well as other groups with protected characteristics, and this could be reflected in pay protection arrangements. For this reason, pay protection arrangements (along with all other elements of the package) must be equality impact assessed (see later sections).

Although there is no statutory limit governing the period of protection, there is a strong case for it to be time-limited. Even if there is no apparent equal pay or discrimination risk, it is generally contrary to good industrial relations to prolong it for a very lengthy period or indefinitely. This is perceived as being unfair to new starters and other non-recipients doing the same or similar work for less money and could give rise to equal pay claims in the future if there was a change in the balance of male and female employees. There is also a possibility of discrimination claims from employees who share another protected characteristic under the Equality Act 2010 (see Part 2).

In early local government single status reviews, most protection arrangements applied for up to five year periods. However, this reduced to three years and sometimes less. It is imperative that all staff must be fully informed about the proposed protection arrangements and how they will affect them; and the proposals must be put out to consultation (see the Implementation section of the guide).

Assessing protection proposals

The following questions should be asked by union representatives involved in pay modelling and negotiations over new/revised grading and pay structures:

- How many jobholders have had their wages/salaries red circled or personally protected?
- How many of these are men and how many are women?

- If the proportions of men and women are significantly different, can this be justified in terms of the features of the job evaluation scheme and job demands?
- In particular, if the numbers and proportions of men whose wages / salaries are red circled or personally protected in the new salary structure is significantly greater than the numbers and proportions of women, can it be demonstrated that the red circling is not a means of evading paying the higher rates to women?

The later section on equality impact assessments gives more detailed guidance.

Options for protection

The options for protection include:

- Maintaining the current terms and conditions of the job holder but when he or she leaves the post it reverts to its evaluated rate (i.e. personal protection) - provided this does not amount to sex discrimination
- Phasing the jobholder's pay into line with the rest of the grade (for posts with equivalent scores) by withholding or restricting future wage increases (i.e. mark time protection) for the 'advantaged' individuals, until the pay rates have equalised.
- Other variations negotiated locally during single status reviews. These included increasing the responsibilities of the post (with the job holder's agreement) so that the protected salary equates to the new demands of the job; and providing opportunities for training and development to enhance protected job holders' opportunities for securing new posts at an equivalent salary to their protected post.

In the third option, care must be taken to ensure that job redesign exercises are genuine and not simply a device to maintain pay for down-graded staff and that arrangements for their operation and access to them are non-discriminatory. This because such arrangements have been subject to successful legal challenge – see Part 2.

It should be noted that employers can only delay paying equal pay to those entitled to it when there is objective justification for doing so. The cost of immediately rectifying the pay disparity cannot, on its own, justify delay or the failure to 'level up' the women's pay (doing equal work) to that paid to protected male employees. Where a protection practice is tainted by sex discrimination, the employer must show objective justification for it. The courts have recognised that, in some circumstances, to cushion a reduction in the men's pay can be a legitimate aim and objectively justified. However, it will not necessarily be objectively justified for that need to be put ahead of implementing pay parity for women (see Part 2).

Additions to basic pay

Working arrangements and premium payments for non-standard hours

Job evaluation, job grades and the associated basic pay relate to the job undertaken during 'normal' working hours. It is legitimate to make additional payments to those required to undertake the same job duties out of normal hours, both to compensate the individuals for the inconvenience and to provide an incentive for staff to work the unsocial hours. Above a certain level in an organisational hierarchy, it is common for the basic salary to cover such working hours as are required to fulfil the job requirements.

Employees who are required to work non-standard patterns of work must be compensated as per the national provisions in Part 3 of the Green and Red Books.

The Part 3 provisions apply unless they are modified locally by negotiation, following the procedures set out in the national agreements.

Proposals to change Green Book working arrangements (and/or any of the payments listed in Part 3.2.3 to 3.2.5) can only be valid if they can be shown to be required to deliver improved services. In other words, the case for any proposed changes must be made out on this basis (not cost cutting); and employers are obliged to:

- seek to meet employees' work-life balance needs
- conduct an equality impact assessment
- ensure that part-time workers receive equal treatment and
- ensure that arrangements are consistent with equal pay legislation

'Working arrangements' includes remuneration i.e. premium rates of pay and enhanced rates of pay (see Part 3.2.3 for the full list). Green Book Part 3.2.2 makes it clear that where no local agreement concerning premium rates is reached, the national provisions set out at Part 3.2.6 and 2.7 will apply. In other words, in the absence of local agreement to change the national premium rates, it would be a breach of the national agreement to impose any changes and it would leave the employer vulnerable to breach of contract and/or Wages Act claims.

Part 3 does allow for an inclusive rate of pay to be paid as an alternative to premium payments and enhancements for working non-standard hours. Union representatives will need to consider whether there is any case for rationalising or simplifying such payments in an acceptable manner, for

example, by converting them into annual amounts for particular working pattern arrangements, which could reduce administration costs. Proposals for an inclusive rate of pay should be subject to an equality impact assessment, as they are usually put forward by the employer as a cost-cutting measure and the affected employees may be worse off overall on an inclusive rate of pay.

Where the union wishes to propose changes to working arrangements to improve employees' work-life balance, there must also be a demonstrable case that the changes will improve service delivery. Any proposals must be subject to an equality impact assessment as well.

Changes to working arrangements should also reflect NJC Part 4 guidance on local workforce development plans (including training and development for staff).

This section gives outline advice only on working arrangements and changes to Part 3 of the Green Book. Branches are strongly advised to obtain further information from their union office. Scottish branches should check the current position with their head office in Scotland.

Payments for performance

Genuine payments for performance can justify differences in pay between individuals undertaking work of equal value, even where those concerned are of opposite gender.

Productivity bonuses

Bonus or productivity payment schemes are only likely to be justifiable if they meet each of the following criteria – that they are:

- accessible to all employees in a comparable position, for example, to school meals and home care employees as well as to grounds maintenance and refuse staff and to associated administrative and clerical support staff, as well as to the front line service providers (unless there is objective justification for their exclusion – see Part 2.)
- directly related to output and/or quality of service, on either an individual or team basis: this would be reflected by variations in payment between individuals/teams; possibly variations over the year; holiday bonus payments calculated as an average of payments over an agreed preceding period
- paid at a level which genuinely reflects variations in output and/or quality, so probably not a major component of total pay

- subject to ongoing monitoring of outcomes to ensure that average bonus payments are broadly equal for male-dominated and female-dominated groups
- subject to regular review to ensure that the scheme continues to meet these criteria.

Individual performance-related pay

As discussed earlier, the focus of performance-related pay on individuals, whose performance is usually assessed by their line manager, leaves such schemes vulnerable to complaints of unfairness and discrimination. These risks can be reduced if the organisation has robust performance management systems in place, a systematic and meaningful approach to employee learning and development, regular monitoring and equality impact assessment of outcomes, and crucially, training (including diversity training) and support for line managers.

Team based pay (TBP)

Team based pay is not common in local government organisations. On the face of it, this may seem surprising, given the extent of team working in local government.

Types of teams include:

- Organisational teams (for example, senior management team; section heads)
- Work teams (for example, a road working gang)
- Project teams (for example, an IT project team)
- Ad hoc teams (for example, a short-life working group)

It is very difficult to devise a fair and effective system to reward team effort. Paying a team bonus is one option, based on a performance-related criterion, with each team member receiving the same sum or a percentage of their base salary. However, there are a host of issues with team based pay which account for its lack of take-up. Firstly, it may be questionable whether TBP acts as an incentive or is needed to improve performance. (And how is improvement to be measured?) Secondly, TBP may not suit the team – the team needs to be stable, semi-autonomous, with a high degree of work interdependency among its members. Thirdly, there can be problems with variable performance within the team and equity issues. Fourthly, and this is highly relevant in the public sector, achievement of the performance criterion (such as a service-related target) can be affected by factors outside the control of the team.

Labour market supplements

Labour market supplements are payments made in addition to base pay (sometimes called ‘off-spine’ payments) to job holders in specific occupations to which the organisation has acute difficulty in

recruiting staff and/or in retaining staff, owing to labour market pressures i.e. because competitor employers are offering higher salaries or more attractive remuneration packages.

Some pay systems, mainly in the private sector, are based on market rates so that the pay system is designed to respond to changing labour market conditions. The structures outlined in this guide are not market models, however, they can all include market-related elements, and broad-banded structures are likely to do so, for example, by using market rates to position job holders in a particular band or by having zones within bands for particular job families or occupational groups whose pay is closely tied to market rates. Narrow graded structures can also use market rates, for example the relevant median market rate might determine the salary mid-points in each grade (although internal relativities (based on JE outcomes) are currently the norm in local government organisations, at least to date).

In the case of organisations that apply the SJC/ NJC agreement, they must use the SJC/NJC pay spine as the basis for setting pay ranges for grades although they could propose the use of market rates in determining pay progression. However, for most employers in the public sector, internal relativities have played a more significant role in the design and operation of pay systems than external relativities for most employee groups. (Local government chief executives and chief officers are an exception to this – their pay is mainly market-related).

This is not to say that external relativities are unimportant in regard to the single status workforce – on the contrary, they can come into play in pay modelling, for example, in attempts to lower the payline in respect of jobs deemed to be over-paid relative to the market. And it is important that single status salary structures are pitched at a level which will recruit and retain employees to the great majority of jobs. Even where this is the case, there may be some jobs for which it is not possible to recruit and retain staff at the grade-related salary. This happens when the group is in short supply, either nationally or locally.

Historically, market shortages were often responded to by upgrading the jobs in short supply, for example, systems programmers and analysts in the early 1980s. Salaries determined in this way were open to challenge at a later date, when the higher payment was no longer justified by the market situation.

The more sensible and recommended approach is to pay an off-spine labour market supplement. The labour market theory behind such a supplement is that the higher than average salaries will attract more people into that occupation, thus relieving the shortage and allowing the market supplement to be

reduced or eliminated over time.

Labour market supplements must be kept under review to check they genuinely continue to reflect the market and they are properly evidenced.

For detailed guidance on the use of labour market supplement, please see NJC Technical Note 15 Market Supplements (2016)

Shared services: local grading and pay reviews

This section covers pay and grading reviews in organisations with shared services arrangements. It gives guidance on the circumstances that could lead to local grading and pay reviews in shared service organisations being proposed by the employer/s or possibly the union. It sets out the basic steps that should be followed.

This chapter should read in conjunction with relevant parts of section 2 – the law. For more detailed information, see NJC Technical Note *13 Implications of Mergers, Shared Service Arrangements and Other Re-Configurations in the Local Government Sector* (2013).

What is meant by shared services?

Shared services arrangements include:

- Relatively informal arrangements where one council provides services to another (under which employees from one council may or may not be seconded to the other council)
- Formal arrangements for one council to provide services to another, under which employees from one council may TUPE transfer into another, or be seconded to the other.
- The establishment of a joint venture company or another distinct legal entity, including ‘arms length’ bodies, to provide the services for the participating councils (and others) under which employees from the participating councils are transferred under TUPE to the new legal entity or are seconded to it.

The term ‘reconfiguration’ is used in the guide to cover all types of structural reorganisation but does not apply to internal reorganisation i.e. within a local authority.

Reconfigurations can be divided into two groups:

- 1) Where employees working in the reconfigured service are employed by two or more separate employers, for example, in informal shared service arrangements through to employees in an ‘arms length’ organisations working alongside council employees;
- 2) Where the employees of the re-configured service or function are employed by a single employer, for example, where employees from more than one organisation are transferred under TUPE or similar arrangements into one organisation (whether ‘arms length’ or otherwise); or where employees from one or more organisations are transferred to work alongside employees already employed in another organisation.

Equal pay risks

Reconfigurations raise grading and pay issues which may be best resolved by a local grading and pay review, particularly where employees are employed by the same or ‘associated employer’ (group 2 above). Where a male and a female worker are in the ‘same employment’, it is possible to take equal pay claims (under the equal pay provisions of the Equality Act 2010). Additionally, under European law, it is possible to make comparisons across employers when there is a ‘single source’ that is responsible for, and capable of addressing, the inequality of pay. (See Part 2 for more information on the law).

There is also a risk of equal pay claims where two employers are ‘associated’, that is, when one employer has control over the other, or where a third person has direct or indirect control over both. So, for example, where a council sets up an arms length body over which it retains direct or indirect control, employees in one organisation may be able to bring an equal pay claim citing a comparator in the other.

Where a comparator is on higher pay owing to TUPE protection, this can provide a defence to an equal pay claim. However, the ‘TUPE defence’ does not apply if a TUPE-protected employee moves to a different post with a different rate of pay voluntarily or as a result of a (legally permissible) internal reorganisation (see Part 2).

In relation to employers in group (1), where employees with different employers are working in the same shared service arrangement, there may be less risk of equal pay claims (as they will probably not be in the ‘same employment’).

Fairness

Aside from equal pay considerations, questions will arise over the terms and conditions of new recruits (and in group 1, who employs them). From an employment relations perspective, issues about fairness are likely to arise when people are working together in similar or supporting roles but on different rates of pay. This can cause grievances and damage staff morale.

Local grading and pay reviews in reconfigured organisations: steps to follow

The following advice applies where the new employer is a single employer or associated employer, i.e. where the employees are in the ‘same employment’ (see Part 2). It will be important for

different branches with affected members to work together, particularly in relation to step 1.

Step 1: Pay and grading scoping exercise

In the run-up to forming the shared service arrangement, the employers should have done a scoping exercise on existing provisions in contracts of employment, the use of job evaluation and grading and pay structures. Branches should ask the employer about proposed future arrangements.

Where a local grading and pay review is proposed as the way forward, it has to be recognised (as representatives who have undertaken single status will know) that this is a major undertaking which should not be rushed. There may be a risk of equal pay claims during the transition to a new structure but this risk is likely to be less than that arising from a botched job. However, particularly where equal pay risks have been identified, the process should not be unduly protracted. In this regard, union opposition to a proposed new pay structure cannot be relied on by an employer as a material factor defence to an equal pay claim – see Part 2.

Step 2: Carry out a jobs audit

This is an HR function, which should be carried out in partnership with recognised trade unions. It can be started before the vesting date of the new organisation and can then inform the development of the new job structure. It involves preparing a comprehensive list of job titles within the new organisation and gathering together relevant job descriptions.

By comparing job descriptions for similar areas of work it will be possible to identify how many different job roles there are and how many share common job titles. Some roles will be common to all organisations (although their duties may vary) and they are likely to have common job titles. Other jobs may be the same or broadly similar but have different job titles. This is particularly true in administrative and clerical fields. In addition, it is likely there will be a number of ‘one off’ jobs.

Where jobs are the same or broadly similar but have different job titles, it will be necessary to rationalise job titles, at least for job evaluation purposes. This may appear to be a laborious task but is essential to the next steps in the process and a good investment of time for the future. A decision will need to be made as to whether this is the point at which to agree common job titles for all jobs in the new organisation, in consultation with employees and their trade union representatives.

It may be that some employees do not have job descriptions or their job descriptions are out of date. Any employees who are without a job description should be issued with an agreed one at this stage. Any out of date job descriptions should be brought up to date. Up to date and accurate job descriptions will allow for more jobs to be matched to an already existing evaluation rather than having to be evaluated separately.

Step 3: Decide which job evaluation scheme will be used

The union position is that there should be an agreement as to which JE scheme to use. Another decision to be made at an early stage is whether to use a paper-based or computerised version, such as Gauge. For a few jobs a paper-based scheme may be appropriate but for larger numbers of jobs a computerised scheme such as Gauge is more time and resource efficient.

It may be tempting to think that, if both predecessor organisations have used the same JES, no further action is required. However, as they will generally have different grading and pay structures, a review will be required.

It is also the case that the JE schemes in use in the local government sector allow scope for ‘local conventions’ (and Help Screens on Gauge), so it is unlikely that the same job would have been evaluated in exactly the same way in the predecessor organisations, even when the same job evaluation scheme has been used. Under the NJC JES, local conventions are permissible locally agreed additions to the guidance on factor level definitions. At a minimum, an audit of job evaluation outcomes will be required.

It is not sufficient to simply align jobs with a new pay structure on the basis of historic JE results or historic pay, without reviewing the JE outcomes. Such an approach risks the jobs being considered not to have been properly evaluated under the same job evaluation scheme and not therefore covered by any JE defence to equal pay claims.

Where predecessor organisations have used different job evaluation schemes for their single status employees, it is possible for a jobholder covered by one scheme to claim equal pay with a job holder covered by a different job evaluation scheme. In such cases, the job evaluation schemes may not provide the employer with a defence. To avoid claims of this nature, the reconfigured organisation should introduce one scheme for all employees across the new organisation, with a single set of local conventions (or computerised JE local help screens).

Assuming the current schemes in use are union-approved, it may be appropriate to select one of them (ensuring that appropriate local conventions are used), or it may be appropriate to choose a different scheme. Either way, it is necessary to evaluate all jobs under the new scheme, including any that were previously evaluated.

This guide does not cover how to carry out a JE exercise. Detailed information is provided in the NJC Technical Notes. This includes advice on evaluating groups of the same and very similar jobs, the use of role profiles and job matching – see the resource list.

Steps 3 and 4 are inter-related in that the employer is likely to argue for the use of a JE scheme that, in its view, best fits the employer's preferred option for a new grading and pay structure. Branches cannot force employers to use the NJC JES or (in Scotland) the SJC-recommended JES. Where the employer wants to use another scheme, union representatives must engage with the employer's arguments, putting the case for the NJC/SJC schemes and where appropriate, debunking myths about them (mentioned elsewhere in this guide). Suffice it to say here that the use of the NJC JES is not incompatible with any of the options for pay systems discussed in this guide. Nor is it incompatible with the notion of the '21st public servant' which (at the time of writing) was being promoted by the LGA.

Step 4: Design a common grading and pay structure

The employer will want a revised or new structure that is fit for purpose, that is, which suits the needs of the new organisation. In principle, this is obviously sensible. A range of factors will influence the employer's preferred option including affordability, the services/s provided or delivered, the financial basis of the organisation (profit-seeking or not-for-profit), its size, its viability in the longer term, the composition of the workforce, the organisational structure (hierarchical or networked) and so forth.

Employers will not necessarily favour the option closest to the status quo although minimum disruption to existing arrangements has its attractions. It may be that some employers see this as an opportunity to develop a distinct identity or (misguidedly – as discussed earlier) as a driver for 'culture change' in organisation.

Earlier sections of this guide set out the main options that branches can expect employers to favour and the issues that each option raises. The guide also sets out the general principles that should guide grading and pay reviews, including equal pay for equal work.

Step 5: Implement the new structure first or implement job evaluation first?

This is posed as a choice because each approach has advantages and disadvantages. The NJC recommends the following (in this order):

- 1) Evaluate the jobs that exist on merger
- 2) Implement the new grading and pay structure
- 3) Then re-evaluate new jobs in the structure as necessary

The main advantage of this approach is that it minimises equal pay risks, whereas the alternative (implementing the new structure first; then undertaking JE) incurs delay in addressing potential pay inequality. (See NJC Technical Note 13 (2013) for more information.)

As emphasised elsewhere in the guide, proposed new structures and reward packages (see below) must be equality impact assessed.

Harmonisation of other terms and conditions

There will need to be an audit of other elements of remuneration to identify differences. This should be done alongside the jobs audit.

As with single status reviews, some employers will propose changes to Part 3 terms and conditions (and possibly other locally negotiated provisions) as part of the negotiations on the new grading and pay structure, with a view to implementing a new total reward package. Others may opt to negotiate separately on Part 3 and other local contractual (and non-contractual) provisions after the implementation of the new grading and pay structure.

The local grading and pay review: Practical first steps

A local pay and grading review is a project which needs to be well managed. For the single status reviews, it was recommended that a joint steering group be set up for this purpose. This should also apply in shared service organisations, consistent with the NJC/SJC agreement principle of jointness.

NJC Technical Note 13 (2013) sets out the practical first steps to be undertaken in the context of shared services. In summary:

- **Organise the logistics**
 - Plan timescales, identify resources needed for the review, check and resolve any IT compatibility issues between constituent organisations (in regard to HR, payroll and finance data, for example).
- **Develop a common terminology**
 - Constituent organisations are likely to use different terms for the same roles, structures and policies. This can cause problems especially in relation to the JE exercise.
- **Devise a communication strategy**
 - So that employees are informed and kept up to date with developments. Agree data protection protocols covering the JE exercise, pay modelling, information to be shared with employees pre and post-implementation. Having a joint communications strategy does not preclude the union (or employer) from also having its own independent strategy. This is legitimate and to be expected. However, neither side will want to be ambushed by the other's independent public communications which contradict an agreed position. This should be avoided as it damages trust and inhibits joint working.

- Develop a training strategy

For all those actively participating in the review such as steering group members, evaluation panel members, Gauge facilitators, job analysts, and pay modelling team members, and those in important supporting roles including stewards and line managers. Joint training is highly recommended. This can be supplemented by union training for union representatives. Refresher training is advisable for union and management representatives who were trained in JE and equality impact assessment/equal pay auditing in the past.

Equality Impact Assessments & Equal Pay Audits

In relation to pay and grading, the essential difference between an equality impact assessment and an equal pay audit is that the EIA is carried out on proposals for new grading and pay structures and terms and conditions, while the EPA is a check on the actual position (at a selected point in time). The method for carrying out EIAs in relation to pay structures and employees' pay and carrying out EPAs is basically the same.

Equality Impact Assessment: National agreement provisions

The NJC and SJC are strongly supportive of equality impact assessment. For example, 'the NJC strongly advises that it is good practice overall to conduct EIAs for all proposed changes which impact on employment and pay and conditions on an ongoing basis. It is particularly important that EIAs are carried out ahead of any savings proposals, reorganisations, shared services, redundancies or other restructuring proposals' (Green Book Part 4.11, updated 2016)

In relation to single status, the 2004 NJC Implementation Agreement requires authorities to include 'an Equality Impact Assessment of proposed changes to grading and pay and other conditions' in single status local pay and grading reviews. The 2004 agreement also requires authorities to carry out EIAs of any proposed changes to Part 3 working arrangements.

In respect of any local grading and pay review, the position remains that the employer should carry out EIAs on proposed changes to pay and conditions. Furthermore, EIAs should be carried out jointly with the unions being involved from the outset (see Green Book Part 4.11).

Equality impact assessment is an established process in local authorities but it may be less familiar to private/third sector employers new to local government. Branches may need to remind employers of their obligations under the NJC and SJC agreements. It is also worth emphasising to employers that it is in their interests to carry out EIAs – it is far better to be proactive in identifying any risk of potential discrimination than to have to deal with the consequences of claims of indirect or direct discrimination.

EIA and the law

Particularly with 'non-traditional' employers in local government, it may be helpful for branches to draw their attention to the requirements of the Public Sector Equality Duty (PSED) and accompanying EHRC guidance. Part 2 outlines the PSED and

the differences in the 'specific duties' of public authorities in Scotland, Wales, Northern Ireland and England.

What is an equality impact assessment?

An equality impact assessment is an analysis of a proposed change to an organisational policy to determine whether it has a disparate impact on groups with relevant protected characteristics as identified in the Equality Act 2010. Essentially, it is a form of risk assessment to ensure that new proposals are not directly or indirectly discriminatory. Importantly, it also helps ensure that equalities considerations are actively taken on board when proposed changes are being developed. (See Part 2.)

Part 4.11 of the Green Book gives more information and sets out the steps to be followed in carrying out an EIA.

Equality Impact Assessment (EIA) and proposed grading and pay structures

To carry out an EIA of a proposed grading and pay structure, it is necessary to identify where men and women are doing equal work. This will be a problem for organisations that have not previously carried out JE across all Green/Red Book jobs. It will also be a problem for employers with shared service arrangements where constituent employers have used different JE schemes. Even if they have used the same JE scheme, there are likely to be differences in the demands of jobs with similar or the same titles. The constituent organisations may have applied different local conventions when evaluating jobs; and each constituent organisation may have adopted a different grading and pay structure.

When the job evaluation exercise has been completed (using the same JES in the case of a shared service organisation), it is possible to identify equal work, but it is still difficult to calculate average basic pay until the new grading and pay structure proposals are available. Once new grading and pay structure proposals are on the table, it is possible to:

- calculate both average previous and proposed basic pay for men and women doing equal work (that is, those in the same proposed new grade) and
- to check that the equal pay gaps are significantly reduced by the proposals.

This is an equality impact assessment (EIA) of the proposed new grading and pay structure, and the term ‘equality impact assessment’ is normally used to describe this process.

Preparing for an EIA

Branches are strongly advised to ensure that carrying out an equality impact assessment on the draft grading and pay structure and a post-implementation equal pay audit is built into the unions’ and management’s project plan for the local grading and pay review.

Branches should be fully involved in the conduct of the EIA as it forms part of the local grading review. The actual data collection and number crunching can be carried out by HR, but the union side should have access to the analysis. The union side should then be fully involved in discussions on any gaps identified, the causes and how the proposed structure and its implementation will rectify the situation.

Much of the data needed to undertake an EIA will be required for grading and pay modelling and costing proposals in any event, so its collection and analysis should not impose an additional burden on the employer. In the case of shared services, it is likely that data will have already been gathered to enable TUPE transfers (for example) so again this part of the exercise should not be burdensome. However, small organisations may need assistance. For example, community schools should be supported by their local authority and academies by the chain’s HR specialists or consultants.

It should be noted that while the process of evaluating jobs can be carried out in accordance with best practice, the resulting grading and pay structure might be indirectly discriminatory. Particular care needs to be taken over:

- the placing of grade boundaries;
- arrangements for progression;
- assimilation arrangements onto the new grades protection and phasing-in arrangements;
- the payment of market supplements and access to benefits.

As mentioned earlier, the EHRC checklists are very helpful in identifying ‘high risk practices’.

Assimilation

While a non-discriminatory job evaluation exercise will put men and women doing equal work in the same grade, the common practice of assimilating employees to the nearest point on the new scale means that they are not necessarily in the correct position on the scale (or in the band) for their experience or competence. Therefore gender pay gaps are likely to remain. With short scales and incremental progression, all employees should

reach the top of the grade within a reasonable period of time. But this could be an equal pay risk if this is not the case. There is clearly a risk in broad-banded and broad-graded structures where progression is performance or competence- related, or contribution-related, and the operation of the pay progression system inhibits the upward movement of female employees assimilated to the ‘incorrect’ position in the band relative to male employees.

Even if these arrangements are not indirectly discriminatory, they will not be perceived as being fair, if, for example, public sector budget restrictions have the effect of freezing the movement and pay of long-serving and/or competent employees assimilated to the lowest pay zone within a broad-graded structure which would normally be reserved for new starters and ‘developing’ (not yet fully competent) employees.

Equal Pay Audits

An equal pay audit (EPA) involves comparing the pay of groups with protected characteristics who are doing equal work in the organisation; investigating the causes of any pay differences by (for example) sex, ethnicity, age and disability; and planning to eliminate unequal pay that cannot be justified.

The term ‘equal pay review’ means the same thing as an ‘equal pay audit’. The EHRC use ‘equal pay review’ in their guidance for small organisations and ‘equal pay audit’ in their guidance for large organisations. The NJC uses the term ‘audit’ to distinguish the checks involved from the grading and pay ‘review’ itself as does this guide (irrespective of the size of the local government organisation).

EPAs and local grading and pay reviews

Where single status reviews have not been completed, the Green Book Implementation Agreement 2004 states that local grading and pay reviews should include ‘an Equal Pay Audit where local pay reviews have been completed without such an audit’.

Ideally, (and this applies to all local grading and pay reviews) an EPA would be completed prior to the review, but if it is not known where men and women are doing equal work, this may not be feasible and the best option is to follow the advice above on equality impact assessment.

After the new grading and pay structure is put in place, it should be subject to regular joint monitoring and (ideally) annual equal pay audits to check that no inequality has resurfaced or been created. At a minimum, the new structure should be checked a year after it is implemented. Where new structures are being phased in over two or more years, an EPA should be conducted yearly to

monitor progress (i.e. equal pay differences should be narrowing), and on the expiry of pay protection arrangements.

The NJC/SJC and EHRC recommend that EPAs are conducted at regular intervals (see below). Besides being a form of risk assessment, EPAs should also play an important role in monitoring an organisation's progress in implementing longer term plans for achieving pay equality and reducing gender pay gaps.

How to carry out an equal pay audit

The Equality and Human Rights Commission (EHRC) recommends a five-step model for carrying out an equal pay audit.

The EHRC model comprises:

- Step 1: Deciding the scope of the audit and the data required
- Step 2: Determining where men and women are doing equal work
- Step 3: Collecting and comparing pay data (that is, calculating average basic pay and total earnings for men and women doing equal work) to identify equal pay gaps
- Step 4: Establishing the causes of any significant pay gaps and addressing the reasons for these.
- Step 5: Developing an equal pay action plan and/or reviewing and monitoring

The EHRC guidance notes explain how to carry out an equal pay audit, using this model. The NJC has issued supplementary advice for local government organisations – see the Green Book Part 4.10 (updated 2016).

In brief, the EHRC model could be applied in most local government organisations as follows:

Step 1: Deciding the scope of the audit and identify the information required

A staged approach

A full EPA would cover all employees in the organisation. However, it is permissible to take a staged approach to EPAs. This would be sensible in the context of local grading and pay reviews. Consequently, EPAs should cover all employees in the 'same employment' (in terms of the Equality Act 2010) and those employed by a 'single source' which could be held to be responsible for the unequal pay and capable of rectifying it. All employees whose contracts of employment are conditioned to the Green/Red Book will be included (including schools-based support staff, temporary and casual workers and staff whose jobs may be transferred/ outsourced). Employees of 'associated employers' should also be included (because, for

example, a female claimant employed by a council could cite a male comparator employed by an associated employer.)

The EHRC guidance addresses equal pay on the basis of sex specifically and directly, although the principles and 5-step model also apply to pay discrimination in relation to other protected characteristics. The NJC Part 4.10 guidance on EPAs makes this clear: an EPA involves:

'...comparing the pay of groups with protected characteristics as identified in the Equality Act 2010 who are doing equal work in the organisation; investigating the causes of any pay gaps by (for example) gender, ethnicity, disability and part or full-time status; and planning to close any gaps that cannot be justified on legitimate grounds'.

Under the Equality Act 2010, part-time status is not a 'protected characteristic' and (as is mentioned later) part-time workers are treated as full-time equivalent (FTE) workers for EIA and EPA analyses of average basic and total earnings. However, as the majority of part-time workers in local government are women, part-time status may be relevant in explaining equal pay gaps in certain grades, particularly in relation to gaps in total earnings where part-timers may have unequal access to additional payments or contractual benefits.

Most organisations in local government (or councils at least) will have full data in regard to employees' sex and age and many are likely to have extensive data on ethnicity and disability. The picture is likely to be mixed in relation to other protected characteristics such as sexual orientation and religion/belief. The extent to which an EPA will be able to drill down to analyse (for example) the pay of different Black and Minority Ethnic (BAME) groups would depend on the ethnic composition of the workforce and quality of data.

If the employer does not have sufficiently robust data on particular protected characteristics, it is advisable not to include them in the EPA. The results will be statistically unreliable, and when very small numbers of employees are involved, it is possible that individuals could be identified from anonymised data. The alternative course of action is to consider using interim measures such as checks on possible 'hot spots' in the structure.

Union representatives should also press employers to improve data collection and monitoring. In this regard branches can play a key supportive role in allaying employees' concerns about (in the case of some protected characteristics) why sensitive personal information is being sought by the employer and how it will be used. In Scotland and Wales, the specific duties of public authorities in relation to the Public Sector Equality Duty may be helpful in getting employers to undertake comprehensive monitoring and equality reporting.

A full EPA

The extension of EPAs to all employees in the organisation is a matter of practicality and assessed equal pay risk. A key difficulty is determining where men and women across the organisation are doing equal work when different groups may be covered by different JE schemes (or none, for some groups) and separate collective bargaining or pay review body arrangements. (Separate pay bargaining arrangements, for example, may constitute a material factor defence to an equal pay claim – see Part 2.) However, organisation-wide EPAs will highlight possible equal pay gaps as well as gender pay gaps, providing a basis for planning how to tackle them.

Data required

Pay information and related data should include: all elements of pay, including premium and unsocial hours payment, performance/competence/contribution-related pay, allowances, pensions and benefits (such as holiday entitlement); and personal characteristics of each employee (gender, post, grade/band, full/part-time, hours worked (and when and where these are worked), starting salary; length of service, time in grade and performance or competence or contribution assessments (if applied).

The EHRC has produced a useful checklist of data required.

The information required is basically the same whether a staged approach is being taken to the EPA or a full audit is being carried out. Likewise, steps 2 to 5 apply irrespective of the scope of the audit.

Step 2: Determining where men and women are doing equal work.

A comparison of the results of the job evaluation exercise (i.e. the rank order of scores) with current wages or salaries will reveal if and where any equal pay gaps exist on basic pay and on total earnings (including unsocial hours payments, bonus and any other plus payments).

When extending the audit to non-Green/Red Book employees, it will be necessary to evaluate at least a sample of their jobs to obtain information on where men and women are carrying out equal work across these groups also.

Where the job evaluation exercise has been carried out and grade boundaries identified, then these can be used as the basis for the pay calculations in step 3 below.

Step 3: Collect and compare pay data to identify any significant pay inequalities between roles of equal value

This step involves comparing pay information for men and women doing equal work by:

- Calculating average basic pay and total average earnings; then calculating the percentage differences for groups of men and women (doing equal work)
- Comparing access to and amounts received of each element in the pay package.

The EHRC guidance notes explain the different statistical analyses that can be used.

Local government has a high proportion of part-time workers and staff working different patterns of hours. The comparison is best done by grossing up part-time workers' hourly rates of pay to their full-time equivalent salaries. This provides a better basis than hourly rates for looking at pro-rata rates for annual salaries and holiday pay, for example.

Any equal pay gaps will then need to be identified. It is important that union representatives are involved in this process and particularly in deciding what pay gaps are significant enough to warrant further investigation.

The EHRC advises that, as a general rule, differences of 5% or more are to be treated as significant and further investigated, but also that any recurring differences of 3% or more should be investigated as being potentially indicative of systemic pay discrimination.

The EIA of the proposed grading and pay structure and EPAs should analyse the impact of protection as proposed and then as implemented. This is best done as a separate analysis of the gender distribution of red, green, and white circles by grade (i.e. where men and women are doing equal work). If there is a disparate (adverse) impact on women (or men) overall and within particular grades such that it could be indirectly discriminatory, this should be capable of being objectively justified. (See the earlier section on protection and Part 2.)

Step 4: Establish the causes of any significant pay inequalities and assess the reasons for them

In step 4, the employer needs to:

- find out if there is a material reason which explains the difference in pay that has nothing to do with the sex of and jobholders and
- examine the pay system to find out which pay policies and practices may have caused or contributed to any identified pay gaps.

If the step 3 analyses identified any significant pay gaps between women and men doing equal work, the starting point is to ask:

- In which elements of pay are the gaps occurring – is it basic pay, performance-related pay, amount of overtime etc?
- What is causing the gap in relation to basic pay - is it starting pay, TUPE protection, performance assessments, market-related pay? In relation to total earnings, is it access to performance or other contingent pay, differences in acceptance of overtime opportunities between men and women etc?

The EHRC Guidance Notes provide a useful set of checklists for Step 4 covering:

- Grading structures
- Starting pay - on entry and on promotion
- Pay progression within and through grades
- Competence pay
- Performance-related pay schemes
- Bonus
- Market forces
- Benefits
- Working time payments
- Local managerial discretion over elements of the pay package

Many of the issues covered by the checklists are mentioned elsewhere in this guide. However, branches are strongly urged to use the EHRC checklists and to get the employer to use them.

Step 5: Develop an equal pay action plan to remedy any direct or indirect discrimination

An EPA may reveal that there are no pay gaps of significance in which case organisations should continue to review and monitor pay policies and practices to maintain and protect the position.

If a pay difference arises from a factor that has a disparate (adverse) impact on women, it has to be objectively justified. If the difference is not justified, there must be a plan in place to eliminate it.

If it is difficult for the employer to establish and document objective justification in relation to any significant equal pay gap, the likelihood is that there is a potential equal pay issue. Both sides will need to work together to develop an action plan to deal with the root cause. Examples of what an action plan might encompass are set out in the guidance on EPAs at Part 4.10 (updated, 2016) of the Green Book.

Dealing with employer non-cooperation

The NJC guidance is very clear that EIAs and EPAs ought to be carried out jointly and follow good practice guidelines.

If the employer is reluctant to use the EHRC checklists, branches should point out that the equal pay audit model is set out in the EHRC *Code of Practice on Equal Pay* (2011). While the Code is not legally binding, in the event of an equal pay or discrimination claim being made, the tribunals and courts are obliged to take into account any part of the Code that appears relevant to the proceedings.

Some employers, perhaps those new to local government or the public sector, or those less accustomed to collective bargaining, might resist disclosing or refuse to disclose information necessary for EIAs and EPAs, and/ or for negotiations on the new pay and grading structure. The first point is that this is contrary to the spirit and provisions of the SJC and NJC agreements. Secondly, it exposes the employer to the risk of equal pay claims and (in Scotland or Wales) such refusal may put the employer in breach of their statutory obligations in respect of the specific duties which form part of the Public Sector Equality Duty (see Part 2).

If reasoned argument fails, union representatives (in Great Britain) could consider two other options:

- To make a freedom of information request to the Information Commissioner. (This has proven very effective in some cases.)
- To make a complaint to the Central Arbitration Committee that the employer has breached its general duty under section 181 of the *Trade Union and Labor Relations (Consolidation) Act 1992* by failing to disclose information to representatives of the union for collective bargaining purposes.

Part 2 gives more information on these options. Branches should bear in mind that neither of these options will resolve the matter speedily and there is no guarantee of success. However, on its own, a warning to the employer that one or other of these steps will be pursued may be sufficient to persuade the employer to cooperate.

Equality Impact Assessment (EIA): Proposed changes to Part 3 provisions

It is very important to note that EIAs of proposed changes to Green Book Part 3 working arrangements and premium rates of pay are mandatory. Part 3.2.4 states that ‘...In determining any new working arrangements required to deliver improvements authorities will ...(ii) conduct an Equality Impact Assessment consistent with the NJC model that will be set out in Part 4’.

This applies to all local pay and grading reviews which include proposals to alter Part 3 provisions and also to any stand-alone proposals from employers to alter terms and conditions governed by Part 3.

While this guide focuses on EIAs in the context of grading and pay reviews, it is important to bear in mind that they are used in the public sector more widely. EIAs are used to assess the likely differential impact of proposed policies, initiatives or changes to services and the organisation's practices and procedures on different groups in the community, as well as the workforce covered by the council's equality policies or statutory duties. Of course, proposed service cuts or alterations will have implications for the employees delivering and supporting the delivery of those services. Therefore union representatives should be involved in these EIAs where proposals which could impact on the workforce.

Detailed guidance on carrying out EIAs on proposals which impact on employment and pay and conditions is set out in Part 4.11 of the Green Book. The principles apply equally to negotiations in Scotland. Additionally, for listed organisations in Scotland, it is a specific duty to assess new or revised policies or practices (whereas this is not the case in England).

Implementation

Implementation steps

The message of this guide is that development and implementation of new grading and pay structures should not be based on irrational assumptions, such as 'nil cost', 'minimal turbulence' or 'no change', but should be carried out jointly, following a logical sequence.

In summary, the recommended key steps are:

- Consider guiding principles and the aims of the review
- Agree on the type of grading and pay structure and pay progression system to be developed. (Narrow graded with incremental progression, or a hybrid system, for example)
- Agree on the job evaluation scheme to be used (This should be a union-approved scheme.)
- Carry out job evaluation in accordance with good practice guidance. (The nature and extent of the JE exercise may depend on the new or revised grading and pay structure being proposed.)
- Model realistic options for a new grading and pay structure, which suit the agreed needs of the organisation.
- Carry out an equality impact assessment of the (near final draft) proposed grading and pay structure. This should include proposals in relation to base pay or salary as well as any proposed changes to other terms and conditions – in other words, the EIA should cover proposed basic pay and total earnings.
- Re-model and renegotiate on any options identified from the EIA as being potentially discriminatory
- Cost the most feasible options
- Agree protection arrangements and (where applicable) finalise proposals for payment of back pay
- Develop mechanisms to deal with assimilation issues, including outlying jobs
- If appropriate, consider phasing options for implementing the new structure
- Consult members fully on the proposed deal, including an individual ballot.

Single status reviews: Compensation for arrears (back pay)

Where single status reviews are still outstanding, it is important to be aware that compensation for past pay discrimination can be awarded up to a maximum of six years (five years in Scotland). This

applies to all equal pay claims, subject to limitation periods for lodging claims in the employment tribunal. Different rules apply in respect of county/ sheriff or high court claims – for further information, please seek legal advice.

In negotiations concerning equal pay, particularly local grading and pay reviews, the trade union side should try to secure the maximum compensation for everyone it considers has a potentially good equal pay claim. This will be evident from the results of the grading and pay review where job evaluation has been used. Jobs which have scored the same or similarly, i.e. that have been shown to be of equal value, can be compared against the pre-review remuneration for those jobs. Where, in the past, women jobholders have been paid less than male job holders for equal work they would have a potentially good claim if the matter was pursued to the tribunal. However, the claimants may have to establish that their work was of equal value to their comparator (as opposed to work rated as equivalent) if the duties of either job had been different prior to them being evaluated in order that the work could be said to have been unequal for some or all of that period.

Strictly speaking, men who have been under-paid relative to other men doing equal work only have legal entitlement to compensation if they can find a female comparator. However, in the interests of fairness and in light of the potential for valid claims from men (who could compare themselves with women doing equal work who receive arrears), the trade union side should seek to secure compensation for all affected workers, regardless of sex.

As its opening position, the union side should try to secure six years arrears (five in Scotland), to be negotiated as a compensation package as part of the agreement on the local grading and pay review. By addressing past and future pay discrimination in this way, the employer and the union are trying to resolve all outstanding equal pay issues without employees or the unions having to resort to litigation.

A settlement on compensation can take into account the risk, difficulties and delays involved in litigation. It may also take into account the benefit of receiving compensation upon the signing of the agreement (as opposed to having to await the uncertain outcome of a tribunal claim). It should be noted that before a claimant can lodge a claim with the employment tribunal, ACAS must be informed (by the claimant submitting the requisite completed form.) This is so that the offer of 'early conciliation' can be made to the claimant and the employer,

with a view to settling the claim. It is however not obligatory to accept the offer of conciliation in order to proceed with a tribunal application. (See Part 2 for more information on conciliation and employment tribunal fees)

A careful assessment will need to be made of any shortfall permissible in the payment of compensation to take account of the disbenefits of litigation. Further advice and clearance should be sought from your union on any proposed deal.

The operative date for the payment of compensation is negotiable. It would be logical to use the date on which the new grading and pay structure takes effect. If this is over a phased period, payment of compensation should at least commence on the earliest date on which the new structure is introduced i.e. when employees move across to the new grades even if for some staff this is to a transitional pay point or grade.

It is not advisable on tactical or legal grounds to put the issue of compensation to one side until the end of the negotiations on the grading and pay review. Firstly, it may leave the union side 'boxed in' whereas if the issue is dealt with during the review, it leaves both sides more options to work with. Secondly, it may cause a prospective draft agreement to unravel (owing to the need for re-costings) or cause the employer to panic and try to instigate or impose drastic cuts. Unions should be able to show that they have put the compensation issue on the agenda and have sought to secure the best possible settlement for members over the negotiations.

Union negotiators will need to make a judgement about whether the amount of compensation offered if less than six (five in Scotland) years is the best that can be achieved by negotiation. For the reasons mentioned above, some element of shortfall is likely to be acceptable. However, if the proposed deal on the grading and pay fails to address the issue of compensation, the unions will generally wish to support members with potential good equal pay claims.

The unions should be striving to achieve the maximum legal entitlement to compensation and 'levelling up' for all workers. Where, as is likely owing to cost considerations, this is not possible and compromise becomes necessary, the unions should be able to demonstrate to members that their starting point was to press for the maximum possible under legislation and in its bargaining proposals.

Local grading and pay reviews: Consulting with members during negotiations and on the final package

As with Single Status, the agreed outcome of any subsequent local pay and grading review will be a collective agreement setting out new or revised terms and conditions of employment (incorporated into individuals' contracts of employment, in most cases).

Members must be kept well briefed on developments during a job evaluation exercise and throughout the negotiations on a local grading and pay review.

It is important that the union side keeps good records of its proposals to the employer and the employer's responses over the period of the negotiations. This information will be vital in explaining to members why the final offer is the best achievable by negotiation. The details of the offer must be fully set out and explained to members, spelling out the pros and cons.

Before reaching any agreement, the unions must fully consult their members, comprehensively and competently. Branches need to plan and prepare for how this will be done. The plan needs to take into account how the branch will communicate with members (particularly non-activists) over the negotiations and the proposed agreement. It will also need to address any weaknesses in branch organisation, such as pockets of non-membership and under-representation of significant groups (numbers-wise) including temporary workers. Arrangements need to be in place to keep members informed who are on parental leave and on long-term leave for other reasons including sickness.

As mentioned earlier, effective union organisation will be needed to be better able to resist 'divide and rule' tactics by the employer and to manage the situation where there are likely to be members who are downgraded (often from well represented, vocal groups) and members who are upgraded (often from under-represented, less powerful groups).

Each union has its own consultative procedures. In general, every member must be given every reasonable opportunity to vote in secret on the proposed agreement in a consultative ballot. Care must be taken to include members who are off work on long term sick leave; staff on parental or carers' leave and career breaks; those on secondments; home-workers and members working in isolation; and members requiring information in special formats to meet their particular needs (for example, large print, Braille, in different languages).

Equal pay issues

Where equal pay issues are concerned, if a majority of members accept any new agreement and compensation in a consultative ballot, the union would be entitled not to pursue equal pay claims on behalf of dissatisfied members who do not accept the outcome and/or who refuse to sign a 'settlement agreement' (formerly called a 'compromise agreement') or a 'COT3' if arrived at through the involvement of ACAS. These members retain their individual legal right to pursue a claim – domestic law does not permit the union or employer to sign away such rights. In these circumstances, if a dissatisfied member asks the union for legal assistance, the union should advise the member to seek independent legal advice. Care must also be taken not to victimise any dissatisfied employees for intending to pursue or taking a claim.

Some employers may want to close down the possibility of any further equal pay claims from individuals, by inviting each individual employee to sign a settlement agreement. Members who are being asked to enter settlement agreements must be advised of the value of any potential claim that they might have and the difference between that and the sum agreed as part of any settlement. They should also be advised of their right to seek independent legal advice.

Imposition by employers

Apart from any organised resistance on the part of union members against the threatened imposition of new terms and conditions of employment, there are legal risks for employers and potential sanctions in taking unilateral action. This can happen, for example, when negotiations are at a stalemate and the employer chooses to terminate them rather than to pursue other means to resolve the outstanding issues. In this regard, the NJC and SJC agreements set out dispute resolution procedures which should be followed by both sides.

Legal duties on the employer include, for example, the duty to consult the union over plans to dismiss staff and re-employ them on less favourable terms. A successful challenge to a failure to consult the recognised unions will result in the employer having to meet compensation bills, which could be substantial in respect of large organisations.

Approving draft single status agreements

Each union has its own arrangements to scrutinise and approve draft local agreements on single status (including the new grading and pay structures) and compensation before they go out to members for consultation. The region and/or head office will check the draft agreement to ensure it complies with union policy and avoids potential equal pay pitfalls and potential claims from members against

the union. The vetting process will also enable good practice to be shared and 'health warnings' on employers' tactics to be made available to other local negotiators.

Branch representatives are encouraged to consult their regional official or designated head office contact, as appropriate, at an early stage where negotiations run into major difficulty. Examples include where the employer is indicating that it will impose a settlement; or where influential members are indicating willingness to accept a potentially discriminatory settlement.

Other local pay and grading reviews (post single status)

Branches should follow their union's current guidance or protocol for approving draft collective agreements and associated national/ regional legal guidance.

Part 2: Equal Pay and the Law

Introduction

What is in Part 2 and who is it for?

Part 2 of the Guide explains the law on equal pay in relation to issues that are likely to come up during local reviews of grading and pay structures (see Part 1).

It is set out in a question and answer format so you can go directly to the section relevant to your query (using the click-through link on the contents page).

Part 2 gives general guidance on equal pay law. It is not a guide on taking cases. How the law applies in practice depends on the specific circumstances of the situation – if you need legal advice, please follow your union's procedures.

As a rule, union representatives should try to resolve equal pay issues by negotiation. Using your knowledge of equal pay law adds weight to your negotiating position. It can help persuade the employer to 'do the right thing' and avoid equal pay elephant traps.

If you are new to equal pay law or negotiations involving equal pay issues, it may be helpful to also refer to other union resources on equal pay and discrimination law to familiarise yourself with the basics.

A note on legal lingo

Legal language can be a barrier but please don't be put off! Where legal terms are used, they are explained.

The right to equal pay applies to women and men but as most equal pay complaints are made by women, the Guide assumes the complainant (or 'claimant' in employment tribunal proceedings) is female.

What about Brexit?

It's too early to say how leaving the European Union (EU) may affect equal pay law.

UK equal pay law is a mix of homegrown ('domestic') law and EU law. Because of this mix and the likelihood that fundamental change will not happen overnight, the Guide outlines relevant EU law, particularly key judgments of the European Court of Justice (ECJ) on equal pay cases.¹

Check for legal updates

Please check your union website for updates to case law² and legislation. This is particularly

important in respect of judgments which may be appealed to a higher court, as an earlier judgment could be overturned.

Online supplement available

More detailed information on some of the topics in Part 2 is available in an online supplement. (This assumes that readers are familiar with the basics of equal pay law.)

What UK legislation covers equal pay?

England, Wales and Scotland

The principle that a woman (or man) is entitled to equal pay for equal work is set out in European Union (EU) law and in the Equality Act 2010 (England, Wales and Scotland).

'Equal work' is the term used in Equality Act 2010³ to cover the different ways in which 'a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does'.

A's work is equal to that of B if it is:

- a) 'like B's work', or
- b) 'work rated as equivalent to B's work [under a job evaluation scheme], or
- c) 'of equal value' to B's work'.

Northern Ireland

The Equal Pay Act (Northern Ireland) 1970 (as amended) allows for the same types of comparisons to be made between persons of the opposite sex who are in the same employment. Northern Ireland also has separate legislation on discrimination.

How is European Union law relevant to equal pay?

As a member of the European Union, the UK Government must ensure that domestic legislation conforms to European law. For equal pay purposes, EU law includes:

- Article 157 of the Treaty on the Functioning of the European Union (TFEU)
- Relevant Directives (see below)
- Judgments of the Court of Justice of the European Union, formerly the European Court of Justice (ECJ).

Article 157

Article 157 of the Treaty (TFEU) requires EU member states to 'ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied' (Article 157(1)).

'Pay' means:

'...the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly from his employer' (Article 157(2)).

Pay includes pensions. (Please refer to other union sources for information on pensions and equality issues.)

The recast Equal Treatment Directive 2006

Seven directives on gender equality were brought together in the EU Equal Treatment Directive (no.2006/54) – called the 'recast Directive', including the Equal Pay Directive.

Broadly, directives set out what member states must include in their domestic law.

For example, Article 4 of the recast Directive requires that job evaluation schemes be non-discriminatory:

'... where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex'.

Discrimination is either 'direct' or 'indirect':

- Direct discrimination: where one person is treated less favourably on the ground of sex than another is, has been, or would be treated in a comparable situation
- indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary' (Equal Treatment Directive 2006, Article 2(1)).

Similar definitions are used in the Equality Act 2010 (sections 13 and 19). They apply not only to sex but to all the 'protected characteristics' covered by the Act: age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; and sexual orientation.

Where are the equal pay provisions in the Equality Act 2010?

When the Equality Act 2010 (EqA) came into force, the Equal Pay Act 1970 and the Sex Discrimination Act 1975 ceased to exist.⁴

With some changes, the provisions of the Equal Pay Act 1970 were included in the Equality Act, Part 5, Chapter 3 'Equality of Terms' (sections 64 -71).

'Terms' refers to the terms of a contract of employment.

Every contract of employment has a 'sex equality clause'. (The employer has no choice in this – it is automatically included by law.)

Where a woman is doing equal work to that of her male comparator but is not getting equal pay, there is a breach of the sex equality clause in her contract of employment (unless the difference in pay is legally justified). If her equal pay claim succeeds, the term in her contract that was less favourable is modified to be no less favourable than the equivalent term in his contract. She is also entitled to be compensated for arrears of (equal) pay owing i.e. 'back pay'.

As mentioned, equal pay applies to both sexes but the comparator must be a person of the 'opposite sex'. The comparator cannot be a person of the same sex as the claimant.

If there is sex discrimination in relation to a work-related matter that is not covered by a term in the contract of employment, the legal route to challenge it is a discrimination claim (not an equality of terms claim).

How does the Equality Act 2010 work in relation to equal pay?

In brief, the employer can only pay a man more than a woman for doing equal work if the difference in their pay can be explained by a reason (called a 'material factor') which does not involve treating her less favourably because of her sex.

If the material factor is tainted by indirect sex discrimination, it has to be objectively justified.

The legal concepts and how they are applied are explained in later sections.

Employment tribunals look at the contracts of employment, not as a whole but on a 'term by term' basis. So, for example, a woman whose basic rate of pay was lower than her male comparator could make a claim even though her total pay package was more favourable than his. (*Hayward v Cammell Laird Shipbuilders Limited* case, 1988 IRLR 257 HL.)⁵

The term by term comparison is explained more fully later in Part 2.

Who is covered by the Equality Act 2010?

The Act applies to all employers regardless of their size and whether they are in the public, private or not-for-profit sector.

The right to equal pay applies to a person who is 'employed' or who holds a 'personal or public office'.

Employment means 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'.⁶

Everyone who has a contract of employment irrespective of their hours of work or length of service is covered by the Act. So, for example, part-time employees and fixed-term employees are covered.

There is additional information in the supplement on part-time workers.

The position of casual workers, zero-hours workers who do not have a contract of employment and self-employed workers is also outlined in the supplement.

What is 'pay' under the Equality Act?

The equal pay provisions of the EqA 2010 cover all aspects of the pay and benefits included in or regulated by the contract of employment, for example:

- Basic pay
- Contractual pay progression
- Contractual (non-discretionary) bonus payments
- Overtime rates and allowances
- Payments for other non-standard working arrangements
- Performance related pay
- Sick pay
- Holiday pay and contractual holiday entitlement
- Car allowances
- Hours of work
- Severance and redundancy pay
- Maternity pay (in respect of pay increases, bonuses and pensions)
- Access to and benefits under occupational pension schemes - final salary schemes and money purchase schemes (with some exceptions linked to state retirement benefits). Also, additional voluntary contributions and benefits derived from them do not constitute 'pay' (*Coloroll Pension Trustees Ltd v Russell and ors* 1995 ICR 179, ECJ).

- Fringe benefits such as interest-free loans, travel concessions, company cars, gym membership, and child care facilities (where specifically provided under the contract)
- Attendance allowances

Because the meaning of 'pay' under the EqA 2010 (and Article 157) is much wider than basic pay, in carrying out local grading and pay reviews, union representatives must be careful to consider all aspects of remuneration, including less obvious elements of 'pay' such as car allowances and (contractual) paid time off for training and development.

Equal pay audits (EPAs) and equality impact assessments (EIAs) should cover all elements of pay and benefits whether they are contractual or not. (See Part 1 for guidance on how to carry out an EPA and an EIA.)

What about benefits?

In general, employers must ensure that they do not deny workers access to benefits because of a protected characteristic such as age or sex. Examples of benefits include canteen provision, meal vouchers, share options, gym membership, healthcare, company cars, car parking and workplace nurseries.

Benefits can be contractual or provided at the discretion of the employer.

The *EHRC Code of Practice on Employment (2011)* gives useful examples of how an employer's practices in relation to benefits could be discriminatory. It also mentions some of the exceptions to the non-discrimination rule, such as some service-related benefits.

What if pay and/or benefits are non-contractual?

Because the equal pay provisions of the EqA covers all terms included in or regulated by the contract of employment, the vast majority of claims relating to pay (broadly defined) will be equal pay claims.

If the discrimination relates to a non-contractual term, the EqA route to use is section 39(2):

'An employer (A) must not discriminate against an employee of A's (B) –

- (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.'
- ⁷

For example, using this route, female employees

have challenged various requirements to work unsocial hours and employers' refusal to grant flexible working requests. Claimants have argued successfully that such requirements (or refusals) indirectly discriminate against female employees because they are statistically more likely than male employees to have domestic caring responsibilities.

In brief, to defeat discrimination claims, the employer has to show there was no direct discrimination; and if there was indirect discrimination, that it was 'a proportionate means of meeting a legitimate aim'. (For example, having no option but to run and staff a 24/7 operation could meet this test - sometimes called the test of objective justification – explained later).

How can an employer's arrangements on pay progression be challenged using the Equality Act?

Care must be taken in designing a new or revised grading and pay structure to ensure that arrangements for pay progression do not treat any group of employees with a protected characteristic less favourably than another.

If, at the pay modelling stage, there is statistical evidence (from an EIA, for instance) that there is adverse impact and the proposal would not be a proportionate means of meeting a legitimate aim, then alternative arrangements must be considered.

If the employer implements (alleged) discriminatory pay progression arrangements, the legal route for pursuing a claim would depend on whether the arrangements were contractual or non-contractual, as explained earlier.

Where male and female employees are doing equal work, different contractual arrangements for pay progression could be a breach of the sex equality clause. This was the situation in *Home Office v Bailey and ors* 2005 IRLR 757 EAT – the male comparators had guaranteed pay increments while pay progression for the female claimants (doing equal work) was dependent on performance rating. The EAT upheld the ET's decision to modify the claimants' less favourable terms in this regard.

Had the claimants' pay progression arrangements (and/or those of the comparators) been non-contractual, the claimants would have to use the discrimination provisions of the EqA 2010. (For sex discrimination claims, it is not necessary for the female employees and the male comparators to be doing equal work.)

If, during local negotiations over pay and grading, it is unclear whether proposed pay progression arrangements would be contractual or non-contractual and if you are concerned they could

be discriminatory, union negotiators can ask the employer to give a legal view. Alternatively or additionally, legal advice can be sought from union sources.

What happens to a pay progression arrangement if the tribunal finds it is discriminatory?

To give an example, the claimant and comparator are doing equal work - she is not entitled to incremental pay progression but he is. If pay progression arrangements are contractual, and her equal pay claim is successful, the term in her contract is modified so it is no less favourable than that of her comparator.

Discrimination claims are different. If a non-contractual pay progression arrangement was held by a tribunal to be discriminatory, it would have to be replaced (ideally by negotiation) with a non-discriminatory alternative. Compensation could be payable to the claimants.

(The defences that employers can use to defeat claims are explained later in Part 2.)

What is equal pay for equal work?

The claimant in an equal pay case must establish that the work she does is equal to that of her comparator. She has to show that they are employed on:

- like work (EqA s.65(1)(a); or
- work rated as equivalent [under a job evaluation scheme] (EqA s.65(1)(b); or
- work of equal value (EqA s.65(1)(c).

The catch-all or shorthand expression for all three (or where one or other may apply) is 'equal work'. If the claimant and her comparator are doing equal work, then she is entitled to equal pay (subject to the employer not having a lawful defence – discussed later).

What is 'like work'?

'Like work' is work which must be the same or broadly similar; and the difference between the claimant's and comparator's work must not be of practical importance in relation to terms and conditions. Quite often the job titles will be the same but this is not essential - jobs with different titles can involve like work. The Equality and Human Rights Commission *Code of Practice on Equal Pay* (2011) gives the example of a woman cook preparing lunches for directors and a male chef cooking breakfast, lunch and tea for employees.

What might be a ‘difference of practical importance’? To give an example from the Code, the Court of Appeal found that a female primary school administrator claiming equal pay with a male secondary school administrator were not employed on like work because there were differences of practical importance between the two jobs, particularly in regard to financial and managerial responsibilities. Note that it is the work that is actually performed which is relevant – not duties ‘on paper’.

What is ‘work rated as equivalent’?

‘Work rated as equivalent’ is work done by a male and female employee that has been assessed under the same job evaluation scheme as being of equal value, in terms of the demands made by the jobs under various headings or factors such as effort, skill and decision making. In practice, this means the jobs have scored the same number of points or they fall into the same grade because they have similar job evaluation scores.

In general, job evaluation (JE) protects employers from equal pay claims where it can be shown that the demands of the jobs being done by employees of the opposite sex are not ‘rated as equivalent’ under the JE scheme.

Can there still be equal pay issues where employees’ work is rated as equivalent?

Same basic pay but different total pay

Female and male job holders whose work has been rated as equivalent could still be paid differently. This happens, for example, where the basic rates of pay are the same but men’s total pay is higher. This is not unlawful if the employer can show that the reason for the pay difference is unrelated to the sex of the job holders, or if it is, it is nevertheless ‘objectively justified’ (explained later).

Historically in local government, bonus payments often accounted for the pay difference. Male manual workers received contractual bonus payments in addition to their basic pay while female manual workers doing work rated as equivalent did not. Women claimants won their cases where there was not a ‘genuine material factor’ – a reason unrelated to sex – which explained why bonus was paid to the men but not the women doing equal work; or where the employer could not show that the adverse impact on women (i.e. indirect discrimination) was objectively justified. This happened, for example, in cases where the payment of bonus had ceased being a genuine productivity payment.

Proposed grading and pay structures – grade boundaries

As mentioned in Part 1 of the Guide, in designing a new or revised grading and pay structure, grade boundaries should not be drawn through ‘clusters’ of JE scores (where the jobs’ JE scores are within a very narrow range) because the job holders are doing work rated as equivalent. If this happens it could result in disproportionately more jobs held by women being allocated to a lower grade and rate of pay than the men’s jobs (or vice versa). During a grading and pay review, this should be picked up during pay modelling or by an equality impact assessment of the proposed grading and pay structure – see Part 1.

What is ‘work of equal value’?

‘Work of equal value’ means the jobs done by the woman and her comparator are different, but can be assessed as being of equal worth or value, by comparing the job under headings such as skill, effort and decision-making.

Equal value claims are the route used by claimants where the employer does not use job evaluation; or JE is used for some groups of jobs but not others; or where the claimant’s and comparator’s jobs have been evaluated under different job evaluation schemes.

Examples of successful equal value cases include comparisons between speech therapists and clinical psychologists (pre-Agenda for Change);⁸ cooks and carpenters (in the private sector); and nursery nurses and architect assistants (pre-single status).

Who can be a comparator for an equal pay claim?

The claimant must have a comparator – a person (or persons) of the opposite sex with whom she compares her pay.

For an equal pay claim, a comparator must be:

- of the opposite sex to the claimant
- employed in the ‘same employment’ as the claimant (see the next section)
- an actual person (or persons) not a hypothetical comparator/s
- her predecessor, however long ago he did the job

The claimant cannot name a successor to a job as her comparator (*Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley* 2008 ICR 1047, EAT).

The claimant can name more than one comparator and there are good reasons for doing so: it increases the chances of success – some comparators could be better than others and, for

various reasons, the tribunal could decide some are ineligible. Also, as the comparison is 'term by term', having more than one comparator might allow the claimant to choose the most advantageous comparator in relation to specific contractual terms. For example, one of the comparators receives a payment which none of the others do – assuming she succeeds in her claim, her contract could not be modified in relation to that term unless she had cited that person as one of her comparators.

If an equal pay claim is successful, the comparator's pay is not reduced – the term in the claimant's contract is modified (levelled up) so it is no less favourable than his contractual term.

As mentioned, for an equal pay claim, the comparator (a man, if the claimant is a woman) cannot be a 'hypothetical' comparator - the claimant cannot argue 'if a man was doing my job, he would be paid more'. But hypothetical comparators are allowed for discrimination claims.

What does 'same employment' mean?

The claimant and her comparator must be in the same employment. The EqA 2010 (s.79) does not use the words 'same employment' but it means that A (the claimant) has to be employed, and B will be a comparator if:

- B is employed by A's employer or an associate of A's employer, and A and B work at the same establishment; or
- B is employed by A's employer or an associate of A's employer and B works at a different establishment from A and common terms apply at the establishments (either generally or as between A and B).

Employment in the 'same service' and the 'single source'

Article 157 (TFEU) allows equal pay claims on a wider basis than the EqA 2010 - where the man and woman are 'employed in the same establishment or service'. They can have different employers but there must be a 'single source' i.e. a single body which is responsible for the pay inequality and has the power to restore equal treatment. This has proved to be a barrier to taking 'same service' claims. Where, for example, the claimants are employed by a public authority and the comparators are employed by a private contractor, the authority must not only be responsible for the pay difference but also be able to intervene to put it right.

The supplement sets out the history of Article 157 litigation and gives more information on the scope for these claims in the public sector (including schools).

It remains to be seen if the Article 157 route for taking ('same service') equal pay claims will survive Brexit.

What is an 'establishment'?

Most of the litigation⁹ over the meaning of 'establishment' and 'common terms' under domestic legislation (the Equal Pay Act 1970) has happened in the context of single status implementation, apart from two important earlier cases.

In *Levertton v Clwyd County Council* (1989 ICR 33, HL), the House of Lords held that the claimant (a nursery nurse) and her comparators (male clerical staff who worked at different establishments) were in the same employment as they were employed by the same authority under common terms and conditions set by NJC Purple Book (covering APT&C staff) even though her hours of work and holiday entitlements were different from those of her comparators. (The nursery nurses subsequently lost their case – the difference in pay was due to a material factor which was not the difference of sex – as explained later.)

What are 'common terms'?

In *British Coal Corporation v Smith and ors* 1996 ICR 515, HL, the House of Lords held that 'common terms' do not have to be identical or near identical. They must be 'substantially comparable' or 'broadly similar'. If the claimants and comparators work at different establishments but their terms and conditions are covered by the same collective agreement, common terms will apply.

What do more recent cases say about the 'same employment' test?

Two leading Scottish cases dealt with the different but related aspects of the test:

Different establishments – common terms apply

In *North v Dumfries and Galloway Council* (2013 UKSC 45), the key question was, where a woman (a school classroom assistant) sought to make a comparison with a man (a manual worker) employed by the same local authority but working in a different establishment – what had to be shown about the prospect of the man coming to work at her workplace?

In short, the Supreme Court rejected the notion that it had to be at least feasible that the comparator could work alongside the claimant on the same terms and conditions. There was no such legal test.

Same establishment

What is the 'establishment'? In *City of Edinburgh v Wilkinson and ors* 2014 CHIS 27, the Inner

House of the Court of Session held that the focus should be on the place of work of the claimant and comparator. This need not be the same building or room – it could be a university campus, for example, or a factory complex but not (in this instance) the local authority. In this case, the claimants included APT&C staff in schools, hostels and social services seeking to compare their pay with manual workers such as grave diggers, gardeners and refuse collectors.

The EqA 2010 allows claims where the claimant and comparator work in different establishments but ‘common terms apply at the establishments’. In the Wilkinson case, the claimants did not take this route because at the time their claims were lodged, the claimants and comparators’ terms of employment were set by different national agreements and, within the Council, single status had not been fully implemented.

On the face of it, Wilkinson is an unhelpful judgment but it was taken under the Equal Pay Act 1970 and the EqA 2010 is worded differently – see the supplement for more information.

What is an ‘associated employer’?

The comparator can be employed by the claimant’s employer or by an associate of the claimant’s employer. Employers are ‘associated’ if one is a company of which the other has control (directly or indirectly), or where both are companies of which a third person has direct or indirect control (EqA 2010, s.79(9)).

What is a ‘company’, for equal pay purposes? In *Glasgow City Council and ors v UNISON Claimants and anor.* (Court of Session (Inner House) 2014, CSIH 27) ¹⁰ the Court held that women who transferred from the Council to Limited Liability Partnerships (LLPs) over which the Council maintained close control could compare their pay with men who remained employed by the Council.

Glasgow City Council transferred responsibility for three services – leisure and recreation, parking and enforcement and care – to three new arms-length external organisations (ALEOs), two of which were LLPs. The other was a community-interest company (CIC). The employment tribunal held that the CIC was a ‘company’ and therefore an associated employer but the LLPs were not. The claimants appealed to the EAT. It decided that a LLP was a ‘company’ (in the ordinary legal sense). The Council had control of the LLPs (this was not disputed) and the LLPs were companies, so the Council was to be treated as an associated employer of the LLPs, and the employees of the Council and the LLPs were to be treated as being in the same employment. The Court of Session agreed with the EAT.

Note: Although this case was taken under the Equal Pay Act 1970, the decision would apply to the equality of terms provisions of the EqA 2010.

If, where there is an associated employer, the claimant and comparator work at different establishments, ‘common terms’ must apply (as explained above).

Why can’t equal pay claims be taken across local authorities?

Essentially, local authorities are different employers and are not associated employers. ‘Statutory bodies corporate’ such as local authorities are not ‘companies’ (*Halsey v Fair Employment Agency* 1989 IRLR, NICA). The ‘same service’ route is not an option because there is not likely to be a single source responsible for the pay inequality and capable of restoring equal treatment. However, new forms of local government organisation have sprung up, as discussed in the next paragraph.

Same employment and local government organisations

Increasingly, council employees are being transferred to new employers that retain or have formal links with the local authority in regard to their structure, financing and management. Because there are different options for the legal form these relationships can take, it is important for union representatives to seek legal advice before seeking comparators, so an assessment can be made, on the particular facts, whether the employers of the claimant and (potential) comparator/s are likely to be associated (under the EqA 2010) or if there is a ‘single source’.

What is the position where employees from different organisations (such as councils) are working alongside each other in (for example) a shared service arrangement and there are pay inequalities?

With the growth in reconfigured services, employees from one organisation can be working alongside employees of another organisation. This can cause tensions where people are doing much the same work but are paid differently because they have separate employers and contractual terms. In a situation where a woman is doing equal work alongside a more highly paid male colleague, if they are not in the same employment, an equal pay claim is not possible unless their employers are associated (as explained earlier) or they are in the ‘same service’ (Article 157 claims - mentioned earlier).

The next section deals with the law and job evaluation.

Is there a legal definition of job evaluation?

The Equality Act 2010 s.80(5)(a) defines a 'job evaluation study' as 'a study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skill and decision-making, the job to be done... by some or all of the workers in an undertaking or group of undertaking'.

The term 'job evaluation study' can also be taken to mean 'JE scheme' which is the expression more commonly used by employers and unions. 'JE system' is also used.

An employer can defeat an equal value claim if:

- it can be shown that the job of the claimant has been given a different (lower) value than the job of the comparator under a JE study; (EqA 2010, s.131(5)) and
- the court or employment tribunal has no 'reasonable grounds for suspecting that the evaluation contained in the study was based on a system that discriminates on grounds of sex or is otherwise unreliable' (s.131(6))

It is for the claimant to show that there are reasonable grounds for suspecting the study is discriminatory or otherwise unsuitable (*Brennan v Sunderland City Council* and *ors* EAT 0286/11/SM).

To provide a valid defence to an equal pay claim, a JE study must be:

- analytical;
- thorough and impartial;
- reliable; and
- gender neutral.

What is 'analytical' job evaluation?

To be an 'analytical' study, the jobs covered by the study cannot be compared as a whole – each job must be analysed on the basis of its demands not overall content. The demands would include headings or factors such as effort, skill, decision making and so forth (*Bromley v H & J Quick Ltd* 1988 IRLR 249 CA).

In a job evaluation exercise, does every job have to be evaluated? What precisely does an 'evaluation' amount to? *Bromley v Quick* gave some pointers but since then there has been wider use of 'job matching' including in the NHS Agenda for Change JE process. As mentioned in Part 1, in a test case, *Hartley and ors v Northumbria Healthcare NHS Foundation Trust and ors*, ET 6.4.09 (2507033/07), the employment tribunal rejected challenges to the use of job matching as carried out under Agenda for Change.

In this case, the claimants challenged the validity of the JES (using the Equal Pay Act 1970). They asked the tribunal to determine, if the scheme was valid, whether it should nevertheless not be relied on because (they argued) it was 'made on a system which discriminated on the ground of sex or was otherwise unsuitable to be relied upon'.¹¹

The tribunal found that the JES was valid. Job matching was done on a factor-by-factor basis, not a whole job basis. It was not invalidated by using composites of existing jobs or generic profiles for new jobs for the matching exercise. It was acceptable to have three methods of evaluation (which would all give the same outcome) and to update profiles and guidance over time. Schemes have to evolve to meet changing circumstances. It was important however that the core elements of the JES (the 16 factor headings and the scoring system) had not changed. It was acceptable for the job of one individual to be identified as being representative of a cluster of jobs which were virtually identical (with only minor differences that did not affect the value of the jobs) and for that job to be evaluated.

The tribunal also found that there were no reasons for not relying on the JES. There was no evidence that national profiles had been designed, or subsequently altered, to benefit employees in predominantly male job groups at the expense of predominantly female job groups. Nor did the Department of Health or the unions exert influence that achieved inappropriately higher banding for any predominantly male (or female) job groups. The system did not discriminate on the ground of sex.¹²

Job matching in local government

In local government, the grading of jobs is decided locally – there are not national profiles for jobs (as in the NHS) or national grading structures in the Green and Red Books. However, as mentioned in Part 1, the NJC JETWG has developed role profiles for some groups of local government jobs that can be used to match jobs. (See the resource list for more information.)

The NJC JETWG has issued best practice guidance on job matching – see NJC JE Technical Working Group (JETWG) Technical Note 11 & Appendix, Job Information for JE (2012) and Technical Note 16: Job Profiles (2017).

Job matching is a very useful process to use when there large numbers of similar jobs to evaluate. It is important to get it right – if the process is flawed it could undermine the validity of the JE exercise and lead to a legal challenge of the results of the local grading and pay review.

What does 'thorough and impartial' mean?

The leading case on these requirements is *Eaton Ltd v Nuttall* EAT 1977 ICR 272.

The JE study must objectively assess the value of the work performed and not leave room for the results to be influenced by subjective views. To meet this standard, there must be rigorous safeguards against subjectivity. The study must be capable of impartial application and not (for example) take into account how well the work is performed by the individual/s doing the job.

A scheme which is thorough and impartial is a 'valid' JE study. In *Diageo plc v Thomson* (EATS/0064/03), the tribunal found that the study had some defects in the way it was carried out. The EAT held that to be a valid study, there must be an examination of the effects of any defects on the ability of the study to be thorough or capable of impartial application.

What does 'reliable in every other way' mean?

This is a broad category. The EHRC give these examples of how a JE study might be unreliable:

- The procedures and practices used in evaluating the jobs are out of date or have been manipulated in some way that renders the outcomes unreliable (*Diageo plc v Thomson*);
- The job evaluation results are out of date (*Dibro Ltd v Hore & ors* 1990 IRLR 129 EAT);
- Jobs are 'slotted in' to a new pay and grading structure on a 'whole job' basis, with no reference to the demands made on jobs under the JE scheme factors (*Bromley v H&J Quick Ltd*);
- The JE process is incomplete.

What if the JE process is not finished?

A JE process will not be considered as being complete until the parties who agreed to carry it out (such as the employer and the union) accept it as a valid JE study.

Once a JE exercise is complete, it is valid even if it is not then used as the basis for setting pay because the results are not to the liking of the employer and other employees (*Arnold v Beecham Group Ltd* 1982 IRLR 307 EAT). This means that employees could use the results to support equal value claims.

Gender neutral

A JE scheme will not provide a defence to an equal pay claim if the claimant can show that the scheme was not gender neutral.

The EHRC give examples of ways in which JE studies have been found to be discriminatory. They include:

- In either its design or implementation, the scheme fails to include, or properly to take

into account, a factor or job demand that is an important element in, for example, a woman's job (such as interpersonal skills or finger dexterity).

- The scheme gives an unjustifiably heavy weighting to factors more typical of male-dominated jobs (such as adverse working conditions, which are highly visible and typical of male-dominated manual jobs) and/or deliberately gives low weighting to factors more typically female-dominated jobs (*Brennan & ors v Sunderland City Council & ors* UKEAT/0286/11/SM).

Each of the cases mentioned in this section are summarised (with key bullet points) in the EHRC publication *Gender -Neutral Job Evaluation Schemes: An Introduction to the Law* (as at January 2014), available online.

In the *Brennan* case, the employer had used the NJC JES but the tribunal criticised the initial evaluations and subsequent job redesign exercises, because their main purpose was to protect the earnings of male employees who would lose bonus payments. For example, assistant cooks with authority to instruct and advise catering assistants were evaluated at level 1 on the 'responsibility for supervision' factor. This contrasted with the treatment of all of the male comparator job groups, which were evaluated at a minimum of level 2 under this factor for similar job demands.

A JE exercise must also be non-discriminatory in its implementation, including at the stage when grade boundaries are being determined and jobs are being allocated to grades according to their scores (*Springboard Sunderland Trust v Robson* 1992 IRLR 261 EAT).

Which JE scheme should be used?

Union representatives should always seek to persuade employers to use the most appropriate JE scheme/s for use in local government organisations. (Contact your regional/head office for advice on union-approved schemes.)

For local authorities and related organisations in England and Wales, the NJC 'believes that its scheme is best suited to meet their needs' (Green Book, Part 4.9, paragraph 8.1). And 'where authorities and related employers use other schemes they will need to ensure that they meet the standards required for an equality-proofed job evaluation system and the principles of the NJC Scheme (see Technical Note 2)' (Green Book, Part 4.9, paragraph 8.3).

For local government organisations in Scotland, the SJC issued a third edition of its JES in 2015, with accompanying guidance from the SJC Joint Technical Working Group.

Does the Equality and Human Rights Commission approve JE schemes?

Some organisations may claim that their JE scheme has been approved or ‘kite-marked’ by the EHRC or one of its predecessors. The truth is that the EHRC never approves or kite-marks JE schemes. The Commission may give feedback on the design of schemes, for example, one of its predecessors - the Equal Opportunities Commission - made comments on the draft NJC JES at the request of the JETWG.

The EHRC does not endorse or approve schemes because it cannot guarantee that any scheme will be implemented in a non-discriminatory way, even if its design and user guidance is exemplary.

Are there examples of discriminatory JE schemes?

There are no recent examples of a JE study used in local government being ‘struck down’ by a tribunal or court on the basis of its discriminatory design. This is not surprising – it is in the interests of scheme owners to have ‘equality-proof’ schemes. However, some legal challenges have resulted in JE scheme owners making modifications to their scheme’s design and/or methods of implementation, and agreeing to settle claims (as in South Lanarkshire in 2015).¹³

Legal challenges to JE schemes are complex and the record shows that it is difficult to successfully challenge the validity of a JE study. (For more information, see the supplement.)

What if the employer wants to use two job evaluation schemes?

In implementing single status, some local authorities used two JE schemes for employees in scope of the Green Book. This occurred mostly where the Hay system had been used historically for all or some groups of APT&C staff and the employer (and sometimes affected employees) wanted to retain the use of Hay for some groups of jobs, usually at the top end of the pay structure.

Job evaluation provides a defence to an equal pay claim only when the claimant’s and comparator’s jobs have been evaluated using the same scheme. Where the claimant’s job has been evaluated using a different scheme to that of her comparator, their work is not ‘rated as equivalent’ and she (or he) can pursue an equal value claim.

There is nothing in law to stop an employer using two schemes but there is a risk: if some jobs evaluated under different schemes were evaluated using the same JE scheme, the job holders could be found to be doing work of equal value. The extent of the risk depends on where, in the pay

structure, the employer ‘draws the line’ between the jobs to be evaluated under one scheme and the jobs to be evaluated under the other. There would be little risk of successful claims where, for example, there was a substantial difference between the demands of the jobs just below the dividing line (in effect, the grade boundary) and the jobs just above it. However, there will most likely be a ‘boundary zone’ occupied by jobs which could evaluate similarly using either scheme. In this boundary zone, potential equal value claims arise if jobs predominantly being done by women are allocated to a lower grade, while their male colleagues’ jobs (evaluated under the other scheme) are allocated to a higher grade.

In brief, where an employer is committed to using two schemes, your union’s advice is as follows:

- to jointly identify the jobs which could be in scope of either scheme (in the boundary zone) and the sex of the job holders;
- evaluate these jobs under both schemes; and,
- during the pay modelling process, to equality impact assess the allocation of the jobs to the proposed grades (in particular, to check if jobs predominantly done by women cluster below the grade boundary (representing the cut-off point for the use of the one or other scheme) or at the lower end of overlapping grades in the boundary zone).

Employers should be warned that the lower the cut-off point in the structure (for instance, near the bottom or below the former APT&C Principal Officer range) the greater the potential equal value problem is likely to be.

For more information on the ‘two-scheme’ scenario, please go to the supplement.

With the reconfiguring of services, increasingly staff are moving to new employers. It is likely that the new employer will have groups of employees on different terms and conditions of employment. A solution is to harmonise terms and conditions but this may take some time. Meanwhile, where male and female employees are doing equal work, there may be potential for like work and/or equal value claims. Job evaluation will not provide a defence for the employer where claimants and comparators had their jobs evaluated under different JE schemes.

What is the material factor defence?

Having looked at JE as an employer’s defence to an equal pay claim, this section outlines the other main type of defence – that there is a ‘material factor’ which explains why a man and woman doing equal work are not paid the same.

In legal terms, a woman who proves she is doing equal work to that of her comparator is entitled

to have the relevant terms of her contract of employment modified (by virtue of the sex equality clause) so it is in line with those of her comparator's contract. But the sex equality clause will have no effect where the employer can show that the difference in pay is due to a 'material factor'.

The material factor cannot involve treating the claimant less favourably (than her male comparator) because of her sex. This is direct discrimination and it is unlawful.

However, the material factor could result in indirect discrimination.¹⁴

The words 'indirect discrimination' are not actually used in the equality of terms provisions of the EqA but 'if A [the claimant] shows that as a result of that factor, A and persons of the same sex doing equal work to A's are put at a particular disadvantage when compared to persons of the opposite sex doing work equal to A's' (s.69(2), this is indirect discrimination. The material factor must then be shown to be 'a proportionate means of achieving a legitimate aim' (s.69(1)(b)).

In short, if the indirect discrimination is the result of a material factor that is a proportionate means of achieving a legitimate aim, it is permissible in law.

In tribunal cases, it is more common (in the public sector at least) for discrimination to be indirect, so that arguments over the material factor defence focus on whether the factor is a proportionate means of achieving a legitimate aim.

What is indirect sex discrimination for equal pay purposes?

Currently, there are a number of ways that the claimant can show that the material factor relied on by the employer is indirectly discriminatory:¹⁵

- The application of an apparently gender neutral 'provision, criterion, or practice' [of the employer] - puts or would put women 'at a particular disadvantage' compared to men (Bilka)
- The employer's pay system lacks transparency, and in relation to relatively large numbers of employees, the average pay of women is less than men (Danfoss)
- There are valid statistics that show a difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men (Enderby)
- There is other evidence of discrimination – which could be shown using statistics, for example – where as a result of the factor, 'A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's' (EqA 2010, s.69(2)).

(Full case references are given elsewhere in Part 2.)

What does 'objective justification' mean?

The concept of 'objective justification' comes from European law.

In *Bilka-Kaufhaus GmbH v Weber von Hartz* (1987 ICR 110 ECJ), the ECJ held that the pay practice will be objectively justified where it:

- i. corresponds to a real need on the part of the employer
- ii. is appropriate with a view to achieving the objective pursued; and
- iii. is necessary to achieve that objective.

The EqA 2010, s.69(2) states that the material factor must be 'a proportionate means of achieving a legitimate aim', otherwise the indirect discrimination will not be justified and the equal pay claim will succeed.

'Objective justification' is often used interchangeably with 'a proportionate means of achieving a legitimate aim' (as in this Guide). In general, they stand for the same thing.

What does the test of objective justification involve?

It is for the employer to show that the material factor is a proportionate means of achieving a legitimate aim. The tribunal will look at the facts in each case. Much of the case law that tribunals follow comes from ECJ judgments. (It is not expected that Brexit will change this.)

If the aim behind the 'material factor' (for example, a pay practice) is itself sex discriminatory, then the aim cannot be legitimate.

If the aim is legitimate, is the material factor is a 'proportionate means' of achieving that aim? To determine this, the tribunal has to carry out a balancing exercise in light of the evidence before it. This involves balancing the discriminatory effects of the employer's pay policy/practice (i.e. the material factor) with the reasonable needs of the employer in applying that policy/practice.

The employer does not have to establish that there was no alternative but to adopt or apply the indirectly discriminatory material factor in order to achieve the legitimate aim. However, the tribunal should consider less discriminatory alternatives that might have been available to achieve that aim.

If it can be shown that the material factor relied on is not tainted by sex discrimination, the employer will not need to show objective justification for the pay difference.

Can budget constraints justify indirect discrimination?

At the time of writing, cost considerations but not cost considerations alone – can be taken into account by the tribunal in deciding whether indirect pay discrimination is objectively justified. In other words, while ‘costs plus’ (costs plus other considerations) may be considered in the balancing exercise, ‘costs alone’ will not suffice in justifying indirect pay discrimination.

The next section outlines the main types of material factor defences put forward by employers.

What are the main material factor defences?

What does ‘material’ mean?

To be ‘material’ the factor relied on by the employer must be ‘significant and relevant’ (*Rainey v Greater Glasgow Health Board* 1987 ICR 129 HL). It must explain the difference between the pay of the claimant/s and the comparator/s. (It is not sufficient that the factor is potentially capable of explaining the difference).

Market forces

The market forces defence covers a range of situations where a woman is paid less than her comparator because the employer maintains that his post attracts a higher rate of pay in the labour market and to recruit or retain employees to posts such as his, it is necessary to pay him more (*Rainey v Greater Glasgow Health Board* 1987 ICR 129, HL).

It is not enough for an employer to simply assert that ‘market forces’ is the material factor relied on to explain the pay disparity – it has to be proved (*Cumbria County Council v Dow (No. 1)* 2008 IRLR 91, EAT).

Not all market forces defences succeed in defeating equal pay claims. They are likely to fail when there is a lack of transparency in respect of pay as in *Barton v Investec Henderson Crosthwaite Securities Ltd* (2003 ICR 1205 EAT), a City bonus case where the employer argued that the comparator was in danger of being head-hunted but the EAT held that the pay system was not transparent and that ‘no tribunal should be seen to condone a City bonus culture involving secrecy and/or a lack of transparency’.

In local government, it is not unusual for there to be hard-to-fill vacancies in respect of specific jobs and for the ‘going rate’ in the market for those jobs to be higher than their rate of pay in the organisation. The unions and national employers recognise that the payment of labour market supplements can be a legitimate and practical way to deal with

short-term pressures. Detailed guidance on labour market supplements is available in the NJC JETWG *Technical Note 15* (2015).

What if the labour market for certain jobs is indirectly discriminatory? This was the situation in *Ratcliffe and ors v North Yorkshire County Council*, (1995 IRLR 439 HL), where in-house school meals workers’ pay was reduced to be competitive with the local going rate for private sector catering jobs, mainly carried out by women. The comparators, male manual workers also subject to compulsory competitive tendering, did not have their pay reduced. The House of Lords held that the labour market rates for the women’s job were sex-tainted – they were lower paid precisely because the work was done by women.

(Additional comment on *Ratcliffe* is included in the supplement.)

Geographical differences

An example of this defence would be where an employer has premises in inner London and Harlow, Essex. Employees at the Harlow workplace (who happen to mostly be women) receive a lower cost of living allowance than their male colleagues in inner London. This would probably be accepted as a material factor defence if the cost of living was higher in inner London.

Skills, qualifications and vocational training

While they can be material factors justifying a pay disparity, in local government organisations where JE is used, normally the required levels of skill, qualification and training will be taken into account in the evaluation of jobs.

Competency requirements

As mentioned in Part 1, employers may propose or operate pay progression based on competency, often in combination with length of service (LOS).

From the employer’s perspective, one reason for having competency-based thresholds is to control the costs of pay progression – thresholds act as a barrier to employees progressing to the top of the grade. Another reason is to reward employees for achieving a prescribed level of competence.

If an equality impact assessment (or information request) revealed that female employees (doing equal work with male employees) were disproportionately clustered immediately below the competency threshold pay point within a grade while males were above it, the employer would have to show objective justification for the material factor (i.e. the operation of the competency threshold). In this respect, an employer could not rely on costs alone to justify the disparate impact on women employees.

In this scenario, the women could not pursue an equal pay claim if they were not doing equal work with the comparators, for instance, where the jobs held by men above the threshold had a higher JE score than the women's jobs such that they were not doing work rated as equivalent. This could happen where a competency threshold was placed at the mid-point of a long pay scale, so that in effect it became a grade boundary.

Where arrangements for competence-based pay are non-contractual, the route to challenge sex (or other prohibited) discrimination is a discrimination claim.¹⁶ (The claimants and comparators do not have to be doing equal work.) A discrimination claim is likely to arise where (for example) there may be gender bias built into the assessment of competence or unequal opportunities to develop competence.

In relation to competence pay, the EHRC advises employers as follows:

'You need to make sure there is no gender bias built into how you assess competence or implement competence pay. For example, do you include part-timers, temporary or casual staff, or those on maternity or career breaks?

You also need to ensure that all employees have equal access to opportunities to develop the required level of competence. For example, the timing and location of any training should accommodate part-time employees who may have caring responsibilities or those on maternity leave.'

(<https://www.equalityhumanrights.com/en/advice-and-guidance/pay-systems>)

(See also the section below on performance-related pay.)

Experience

Rewarding experience can provide a material factor defence.

Pay structures based on equal value-based JE should, in theory, minimise the use of experience as a basis for paying some individuals more than others. Equal value-based JE unpacks 'experience' in a non-discriminatory way so it can be taken into account appropriately in grading jobs and paying people. For example, job knowledge can be acquired through a combination of experience and formal training. Experience is also rewarded by service-based incremental progression, as, to an extent, experience develops over time.

In job-evaluated pay structures with incremental progression, most new starters will be placed on the bottom pay point in the grade. Where an employer places a new starter on a higher pay point, the usual justification relates to market forces

i.e. the potential recruit can command a higher salary with a competitor employer. However, in *Secretary of State for Justice v Bowling* (2012, IRLR 382 EAT), the employer succeeded in arguing that the claimant's greater experience and skills (ten years in the type of work entailed in the job) was the material factor explaining the pay difference. This was a 'like work' case involving two Prison Service employees in IT support roles recruited at around the same time in 2008. The claimant started on spinal column point 1 of the seven point scale while her comparator started on spinal column point 3 (a difference of £800). Progression was on an annual basis subject to a satisfactory performance assessment. The tribunal had decided that the continuation of the pay differential until her pay caught up was discriminatory. The EAT overturned the ET on this point, holding that because the original pay gap had nothing to do with gender, neither did its perpetuation owing to incremental progression.

Length of service

Length of service (LOS) can provide a material factor defence. For example, employee A, who is doing equal work with B, is paid less than B because he (B) has longer service than her (A) and it is the employer's policy to reward loyalty in order to retain staff.

Because, in general, statistically women are less likely than men to attain long service, a pay structure with long pay scales may impact adversely on female employees and require objective justification.

Part 1 of the Guide suggests that having four to five increments per grade is generally acceptable. Employees should have the opportunity to be rewarded for developing experience and ongoing service. Most local authorities got rid of very long incremental pay scales during the local single status reviews. In general, the longer the pay scale, the greater the risk that indirect discrimination will not be justified; for example, it was held in *Wilson v Health and Safety Executive* (2010 ICR 302 CA) that rewarding service over a ten-year period could not be justified.

The courts accept that in principle it is a legitimate aim for an employer to reward longer service. The question is, for how long? In *Cadman v Health and Safety Executive* (2006 ICR 1623 ECJ), the ECJ held that where the claimant provides evidence capable of giving rise to 'serious doubts' about the appropriateness of the length of service criterion, the employer would be required to specifically justify it.

Although LOS is still the most common pay progression system in local government, in future local grading and pay reviews, employers may propose alternatives, such as a combination of LOS

and competency/contribution-based progression, and/or variations within the pay structure (for example, spot rates for some grades, grades of different lengths). As emphasised in Part 1, pay progression proposals should be equality impact assessed.

Where an equality impact assessment shows there is disparate impact on one sex, (for example, female staff clustered disproportionately at the bottom end of a grades or grades) the reasons would need to be investigated in order to check whether the indirect discrimination would be objectively justified.

In the *Wilson* case, the Court of Appeal clarified that objective justification could be required both in relation to the adoption of a LOS criterion and its application.

What happens if the comparator has longer service than the claimant and she wins her claim: is she entitled to have her pay raised to the same service-related incremental point in the grade as her comparator? The supplement mentions a Court of Appeal judgment (in a work rated as equivalent case) where the answer was 'no' - *Evesham v North Hertfordshire Health Authority and another* (2000, ICR 612, CA.)

What about age discrimination in pay structures?

Because younger workers generally have shorter service than older workers, the payment of benefits based on LOS adversely impacts on them and is indirectly discriminatory. However, the EqA 2010 (Schedule 9, Part 2, Paragraph 10) permits an absolute exemption from age discrimination rules for a benefit, facility or service based on a length of service of up to five years.

The five-year exemption enables the employer to pay person A less than person B for doing equal work on the basis that B has longer service – any longer would require justification. This partly explains why, where local government organisations' pay structures have incremental pay progression based on LOS, typically grades have up to five incremental pay points.

If A's service exceeds five years, the employer can only rely on the exemption if the employer 'reasonably believes that doing so fulfills a business need' (EqA, Schedule 9, paragraph 10 (2)).

Performance-related pay

In principle, it is legitimate to pay higher performing employees more than others. So it is not unlawful to pay employees doing equal work differently on this basis and a performance-related pay scheme is capable of providing a material factor defence. However, the PRP scheme will be open to challenge if it can be demonstrated that it is discriminatory in any way. Evidence pointing in this direction would

include the absence of clear rules or guidance as to how line managers should carry out assessments; indirectly discriminatory assessment criteria; and the scope for subjectivity in making judgments about individual employees' performance and reward, including the extent of line managers' discretion in assessing performance and/or deciding on awards.

As stated in Part 1, the local government unions do not support the use of performance-related pay. The following advice applies where the employer persists in going ahead with it.

Where employers have PRP schemes or other merit pay systems, the outcomes should be regularly monitored as part of equal pay audits (EPAs). PRP payments should be separately identified within the audit (by grade and gender) as a component of total average (full-time equivalent) pay.

Any proposals for PRP, competency-related pay or contribution-related pay should be equality impact assessed. If an EIA indicates that there might be disparate impact on women or another protected group, possible causes could include the assessment criteria and processes. It would be necessary to investigate in more depth to pinpoint what was causing the disparate impact. It is inconceivable that the work carried out by female workers would be generally of a lower quality. (*Handels og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* 1989 IRLR 532, ECJ).

If an EIA shows that disparate impact could occur, the proposed PRP scheme should be modified to remove any significant risk of it being indirectly discriminatory. If, in your union's view, there are serious doubts as to whether a scheme is likely to be objectively justified, union representatives should argue that it be abandoned and or replaced by a non-discriminatory alternative.

Productivity bonuses

The local authority manual workers' bonus issue (mentioned earlier in the Guide) is largely historical but the principles laid down by the case law apply in general to productivity-related payments.

The key issue for the tribunal is not whether the reason for awarding a bonus is good or fair but whether the reason is tainted by sex discrimination (*Bury Metropolitan Borough Council v Hamilton and ors*; *Sunderland City Council v Brennan and ors* (2011, IRLR 358, EAT)).

In *Gibson v Sheffield City Council* (2010 ICR 708 CA), the Court of Appeal referred to *Cumbria County Council v Dow and ors (No. 1)* (2008 IRLR 91, EAT) and *Coventry City Council v Nicholls and ors* (2009 IRLR 345 EAT), in which it was suggested that if bonuses were paid only to male-dominated

groups because of particular features of their job not shared by female claimants, that necessarily gives rise to indirect discrimination requiring objective justification. (The same could be said for team-based performance-related pay.)

In the *Bury* case, the bonus scheme had applied to jobs mainly done by male manual workers but it had not been considered suitable for the jobs of mainly female manual workers. Although there had been a link to productivity, it had long since ceased. As the material factor explaining the pay difference was tainted by sex discrimination, it required objective justification. The fact that the bonus scheme had ceased to be linked to productivity meant that it could not be justified.

Hartlepool Borough Council and anor v Dolphin and ors (2009 IRLR 168, EAT) was a classic case of an incentive scheme being introduced in response to union pressure to get around restrictive Government pay policy in the 1970s to the benefit of male workers and with no particular link to productivity.

Not all bonus-related material factor defences have failed (for example, in the *Paterson* case, mentioned later.)

Unsocial working hours

Working unsocial hours can be the material factor explaining a pay difference between male and female employees doing equal work (*National Coal Board v Sherwin and anor* 1978 ICR 700, EAT).

Differences in the average total pay of male and female employees¹⁷ doing equal work are often explained by the payment of unsocial hours payments to a group/s of predominantly one sex. This is usually related to a feature or requirement of the job, for example, driving a grit-spreader at night in the winter months, but it will nevertheless require objective justification if one sex is adversely impacted – which would be the case where, for example, grit-spreader drivers in receipt of unsocial payments were mainly male workers while the jobs done by those not in receipt of such payments were predominantly female workers. In this hypothetical example, most likely, it would be regarded as a legitimate aim to keep roads safe during harsh winter weather, and for technical and traffic-related reasons the bulk of grit-spreading had to be done at night. To attract employees to undertake this work, payment for working unsocial hours would be a proportionate means of achieving that aim, justifying indirect discrimination based on evidence that female employees' caring responsibilities prevented them from undertaking jobs involving night work.

In the case of *Blackburn and anor v Chief Constable of West Midlands Police* (2009 IRLR 135, CA), part-time female police officers doing like

work with male full-time police officers were paid less because the men received payments under a bonus scheme which rewarded officers who were available to work at night. The claimants worked part-time owing to their childcare responsibilities and were not available to work at nights. The Court of Appeal held that a bonus scheme designed to reward police officers who were available to work at night was objectively justified as an appropriate and necessary means of rewarding unsocial hours working.

Access to working time and other premium payments

In carrying out EPAs and EIAs, it is important to check access to working time payments. If the analysis shows that predominantly female (or male) jobs are excluded from access to premium payments (or overtime), or that overtime is restricted to certain grades or jobs or allocated on a discretionary basis, the reason for this should be identified and the questions asked, would these arrangements be objectively justified? Does the employer have a legitimate aim in respect of the pay practice/policy? If so, are there alternatives to the current/proposed arrangements that could reduce, minimise or remove the adverse impact on the affected group? (A tribunal would want to be satisfied that the means taken to achieve a legitimate aim were proportional – was there a viable alternative available that could have avoided or reduced the adverse impact? But note the employer does not have to prove that there was no alternative available.)

On-call payments

In *Cooksey and ors v Trafford Borough Council* (UKEAT/0255/11/SM), the tribunal rejected the employer's material factor defence in regard to the payment of bonus (dating from the 1960s), attendance allowances and on-call allowances. The EAT overturned the decision in relation to on-call allowances. Having decided that it was a legitimate aim to pay an on-call allowance so that someone with the necessary skills was available to be called out if required, the EAT said the tribunal erred because it then went on to consider whether there were alternative means to achieve a *different* aim. (The ET thought that the employer could have had a rota of on-call staff instead of making on-call payments.) The EAT held that given the identified aim, it was plain and obvious that the only means of achieving it was by paying an on-call allowance.

It is important to remember that an equal pay claim involves a term-by-term comparison not a comparison based on the 'lumping together' of the claimant's remuneration and the comparator's remuneration. In *Hayward* case (mentioned earlier), Ms Hayward was entitled to the same hourly wage and overtime rate as her comparator with whom

she was doing work of equal value despite the fact she received additional holidays and better sickness benefits. However, it can be difficult for tribunals to disentangle contractual terms and each case has to be considered on its own facts. Two cases (*Degnan and Brownbill*) illustrating these issues are mentioned in the supplement.

Overtime

This issue mainly affects part-time workers. Because of the pro-rata principle, a part-time worker's entitlement to overtime is related to that of a full-time worker. If a part-time employee works more than her contracted hours but less than a male full-time employee's normal weekly hours, she is not entitled to overtime pay for extra hours. This is not a breach of Article 157 (*Stadt Lengerich v Helmig* 1996 ICR 35, ECJ).

The position would be different if the overall pay of full-time employees was higher than that of part-time employees in respect of the same number of hours worked. If there was disparate impact on part-time workers and there were considerably more female part-timers than male part-timers, then the question of objective justification would arise (*Voß v Land Berlin* 2008 1 CMLR 49, ECJ). A case on this point is *Clark v Metropolitan Police Authority and anor* (The Mayor's and City of London Court, Case No. 0MY00263). The claimant was a female part-time inspector who was paid an hourly rate for a 32 hour week but did not receive overtime for extra hours worked. Her comparators, male full-time inspectors were paid the equivalent of 40 hours per week even if they worked longer hours – i.e. inspectors were not paid overtime (a key fact in this case). If the claimant and comparator worked the same number of hours in excess of 32, the comparators received a higher hourly rate of pay. The Court decided that this was indirect sex discrimination as part-time workers were overwhelmingly women. The fact that the pay practice had its origins in a national collective agreement did not provide objective justification as the impact on female employees had not been considered at the time of the negotiations.

Shift patterns

If a shift pattern results in full-timers working unsocial hours (for example, working rotating shifts) while that is not the case for part-time women workers who work shifts on fixed hours, it may not be discriminatory for the male full-time workers to be paid unsocial hours payments (*Montgomery v Lowfield Distribution Ltd* EAT 932/95). In this case, unsocial hours working was the material factor explaining the difference in pay, not the difference of sex.

Holidays

In *Leverton v Clwyd County Council* (1989 ICR 33, HL), the House of Lords considered that when comparing the pay of a nursery nurse with a full-time worker, their different hours of work and annual leave entitlements had to be taken into account in calculating their hourly rates of pay on a pro rata basis. (The annual salary of the claimant was lower than her comparators.) The claimant worked 32.5 hours a week and was entitled to 70 days annual leave while her comparators worked 37-39 hours and were entitled to 20 days annual leave (plus increments after five years service), hence the claimant's notional hourly rate of pay was marginally higher – at £4.42 (compared with £4.40 for the comparator). Thus, the material factor was the difference in the number of hours worked over the course of the year, unrelated to the sex of the employees, and this justified the difference between the annual salary of the nursery nurse and her comparators.

Pay protection

The payment of protection can be a material factor defence to an equal pay claim.

The next section looks firstly at protection relating to internal restructuring or reorganisation, mainly concerning individuals or relatively small groups of employees; and secondly, at protection as a material factor defence in relation to single status reviews. (The single status cases provide lessons for the future – outlined later.)

TUPE protection is also dealt with briefly.

Some protection arrangements are laid down in statutory transfer orders (for example, when local government reorganisation has taken place) – these are not covered.

Reorganisations

When jobs are regraded or an employee is moved to lower paid work (for reasons to do with physical incapacity, for example), it has been common practice for employers to 'red-circle' the affected employee i.e. to allow her/him to retain their higher salary on a temporary basis, and more unusually, on a permanent basis. Protection (especially on a temporary basis) is widely regarded as being fair – where individuals are downgraded through no fault of their own they should be protected from hardship. For the employer, it avoids breach of contract claims and may help retain those staff. But when the person(s) protected is of the opposite sex to a person doing equal work who is not in the protected group and who is paid less, equal pay issues arise, as shown in the *Haq* case (won by the employer).

In *Haq v The Audit Commission* (2013 IRLR 206 CA), the claimants and comparators were doing like work – originally the men had more senior roles to

the women but when their jobs were amalgamated (the new job retaining more elements of the junior role) the men continued to be paid more. It was Audit Commission policy that as a result of reorganisation, employees moved to another job in the same grade retained their previous position on the incremental scale. The Court of Appeal held that there was prima facie sex discrimination (i.e. the difference in pay was tainted by sex discrimination)¹⁸ but the employer's defence of objective justification succeeded. The legitimate aim was twofold: to stop employees suffering a reduction in pay, and to prevent the loss of skills and experience. The means to achieve the aim were proportional – the alternatives considered by the EAT were flawed – there were no means left except for that adopted by the employer.

If pay protection results from direct discrimination, it will fail as a material factor defence (*Snoxell and anor v Vauxhall Motors Ltd* 1977 ICR 700 EAT).

Single status and pay protection

As part of local single status agreements, remaining manual worker bonus schemes came to an end. In some local authorities, three to four year protection deals were agreed to maintain the earnings of male workers who were losing bonus payments. Meanwhile women doing equal work whose pay was not being reduced (because they had not received bonuses) argued for 'levelling up' on the grounds that had they not been underpaid in the past, they too would have been receiving bonus and have qualified for pay protection. They argued that their exclusion from pay protection perpetuated historic pay discrimination (i.e. indirect sex discrimination) which could not be objectively justified. (*Redcar and Cleveland Borough Council v Bainbridge and ors*; *Middlesbrough Borough Council and Surtees and ors*, 2009 ICR 133 CA.)

In the *Redcar* case, the female claimants had already won a 'pre-single status' equal pay claim challenging their exclusion from receipt of bonus. In regard to the single status protection arrangements, the Court upheld the employment tribunal's decision that they were indirectly discriminatory and not objectively justified. In particular, the Council had given no thought to the discriminatory nature of the pay protection scheme or taken the views of the female employees into account, and it had not considered the cost of including the female employees in the pay protection scheme. However, this did not mean that an employer could never justify an indirectly discriminatory pay protection scheme. For instance, assuming the employer had a legitimate aim (such as cushioning the blow of pay reduction), if the employer had no reason to think its pay protection scheme was discriminatory when it was implemented, that could defeat a 'levelling up' equal pay claim. In the *Redcar* case, the employer knew (from the outcome of the claimants' preceding equal pay claim) that protecting bonus earnings was discriminatory.

In the *Middlesbrough* case, the Court held that the indirectly discriminatory pay protection scheme was not objectively justified. The Council failed in its argument that at the time (unlike *Redcar* and *Cleveland*) it did not know what the outcome of pre-Green Book equal pay claims regarding bonus would be – the Court said it should have known there was a real risk that the claims would succeed. Lack of knowledge of past discrimination was relevant to the test of objective justification but not to the issue of whether the protection arrangements were sex-tainted in the first place.

Cost and affordability

The issue of cost was significant in these cases. For example, in the *Middlesbrough* case, the EAT had some sympathy with the financial pressures on the Council. The Court of Appeal seemed to place more emphasis on the claimant's rights – although it did not rule out an employer putting cushioning the reduction in men's pay ahead of levelling up women's pay in the context of pressing financial constraints, it observed that it could not be right for councils to have allowed their pay structures to fall out of compliance with equal pay law for many years and then to assert a right to take a further three to four years to comply – this would only be possible where the objective justification test was satisfied.

As mentioned earlier, cost considerations alone do not provide objective justification.

Employers running a pay protection material factor defence have to provide detailed proof that they cannot afford to extend pay protection to women claimants (*Bury Metropolitan Borough Council v Hamilton and ors*; *Sunderland City Council v Brennan and ors* 2011 IRLR 358, EAT). Mere assertion of unaffordability is not proof of it. Bury MBC had considered extending protection to female workers whose comparators received protection following withdrawal of their bonus payments, but decided against it owing to the cost and uncertainty of the outcome of the women's equal pay claims. The EAT took the view that the employer should have contingency plans in this situation and could have produced illustrative calculations for the tribunal, in order to run a pay protection material factor defence. (The EAT referred specifically to local authorities in this regard but the same might be said for any large employer or medium sized business with HR or accountancy support.)

The Equality Act and protection

At the time, the *Bainbridge and Surtees* judgments left councils in a quandary as to what protection arrangements would be lawful. It seemed that indirectly discriminatory arrangements could be justified but that the Court of Appeal had set the bar high. The EAT had given helpful pointers (not disturbed by the Court of Appeal) – cushioning the blow against sudden and significant pay reduction

could be a legitimate aim; pay protection should be temporary and limited to existing employees. Subsequently, the Equality Act 2010 section 69(3) clarified that in relation to the employer's material factor defence, 'the long-term objective of reducing inequality between men's' and women's terms of work is always to be regarded as a legitimate aim'. Of course, the means used to achieve that aim must still be proportionate.

How long can protection last?

There is no statutory limit on the period of protection nor have the courts laid down precise timescales. But there is longstanding case law in support of the principle of phasing out and eventually eliminating protection (dating from the *Snoxell* case, mentioned earlier). Particularly where indirect sex discrimination comes into play (as in the *Redcar* and *Middlesbrough* cases), the longer it takes for the lower paid (claimant) group's pay to catch up with that of the protected (comparator) group, the harder it is likely to be for the employer to prove objective justification.

If the employer lets an outsider into the red circle (by paying the outsider at the higher rate received by those in the red circle) as a rule, it will destroy the defence, because the woman can claim parity with the outsider. (*United Biscuits Ltd v Young* [1978] IRLR 15 EAT)

Pay protection and future local grading and pay reviews

In relation to single status implementation, equal pay issues relating to protection have now largely been resolved. However, it is important for union representatives to be aware of this history and lessons learnt, as pay protection is bound to be a feature of future negotiations on local grading and pay structures.

Case law provides useful pointers but no exact formula as to what pay protection arrangements will be lawful.

What the employer knew or should have known about past pay discrimination is something that would be considered by the tribunal in the event of an equal pay challenge in regard to protection arrangements. This highlights the importance of union representatives pressing employers to undertake regular equal pay audits and insisting that EIAs are carried out on proposed changes to grading and pay structures, including protection arrangements. An employer would be hard pressed to deny all knowledge of discriminatory pay arrangements where an EPA indicated that it existed.

Case law also highlights the importance of union representatives pressing employers to provide projected or indicative costings of proposals for protection and (we would add) any contingent or merit payments.

How to equality impact assess proposals for protection

Advice is available from your union regional/head office on how to undertake an EIA of proposals for protection (or check the employer's analysis). Sometimes this is called a 'red-white-green circle' analysis - red-circles being protected employees; white-circles - employees' whose pay position stays the same; and green-circles - employees whose pay will increase as their posts are to be upgraded.

TUPE protection

In broad terms, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), safeguard the terms and conditions of employees transferred to a new employer (the transferee) as a result of the sale of the business or change in service provision following a tendering exercise.

TUPE can provide a material factor defence to an equal pay claim. For example, where the reason for the higher pay of the comparators is their TUPE protection, the pay difference has nothing to do with their sex (*Nelson v Carillion Services Ltd* 2003 ICR 1256, CA).

How long after a transfer can a TUPE defence last?

There is no law or rule of thumb in answer to this - each case has to be decided on its facts. TUPE protects transferred employees from having their contracts varied for a reason connected with the transfer. The more time passes, the greater the chance that an intervening event will (as the lawyers put it) 'break the chain of causation' between the TUPE transfer and the reason for it being the cause of the pay difference (*Kings College London v Clark* EAT 1049/02).

Where TUPE is accepted as the material factor explaining the pay difference, if the continuing pay difference is indirectly discriminatory, the employer also has to show that it is objectively justified.

The sex equality clause and TUPE

The sex equality clause in the contract of employment is triggered as soon as a less favourable term comes into being - it does not need the woman (or man) to make an equal pay claim to bring it into being. This is important in a TUPE context because it means that if the less favourable term came into being under one employer (the transferor) and then the woman TUPE-transfers to a new employer (the transferee), and she subsequently makes an equal pay claim, (depending on time limits - see below) both the old and new employer may be liable to pay compensation if her claim succeeds. This was established by the *Sodexo Ltd and anor v Guttridge and ors* case (2009, ICR 1486, CA). Female hospital cleaners and domestic staff were in the same

employment as male maintenance workers before the women workers transferred to Sodexo Ltd. They launched their claims as Sodexo employees, citing the hospital maintenance workers as their comparators. Because the hospital trust's liabilities under the women's contracts of employment had transferred under TUPE to Sodexo Ltd, it was obliged to put right the pay inequality even though the company was not originally responsible for it.

Note: In the *Sodexo* case, the claimants did not seek to argue that they were still in the 'same employment' as their comparators post-transfer, i.e. at the time they made their claim - they were not claiming equal pay on the basis of their comparators' current pay. (Remember that the comparator must be employed by the same or an associated employer; or that the claimant must be in the same service, where a single source is responsible for the pay disparity and can rectify it). The claimants were able to cite the hospital maintenance men as their comparators because of the TUPE provisions (now Reg 4(2)).

Time limits, TUPE and equal pay claims

Time limits for equal claims in TUPE situations have proved difficult for the courts. The current position is as follows. The majority decision of the Court of Appeal in *Sodexo* was that any equal pay claim relating to periods prior to a transfer has to be brought within six months of the transfer and not within six months of the termination of the of the employee's employment with the transferee (the 'new' employer).

In the same case, the Court held unanimously that the time limit in respect of claims relating to the post-transfer failure of the transferee to honour the equality clause in the transferred employees' contracts does not begin to run until the termination of the employees' contracts with the transferee.

Note: The relationship between TUPE and equality law is complex. It may be advisable to seek legal advice on proposed changes to, or harmonisation of, employees' terms and conditions post-transfer, and certainly if individual or multiple claims¹⁹ could be an option.

Different collective bargaining agreements

If male and female employees are doing equal work but do not receive equal pay because their pay is determined by different collective agreements, this can be a material factor defence to an equal pay claim. The tribunal would look into how the pay difference came about, asking about the history of the negotiations and the collective bargaining processes. If direct discrimination had occurred, the material factor defence would fail. If there was indirect discrimination (i.e. where women as a group are adversely affected by the collectively agreed terms in comparison with men as a group), the

employer must show that it is objectively justified.

The Enderby case

The leading case is *Enderby v Frenchay Health Authority and anor* (1994 ICR 112 ECJ). Ms Enderby, a senior speech therapist, claimed equal pay with male senior pharmacists and clinical psychologists – she was in the same employment as them and doing work of equal value. The employer argued that the 'collective bargaining difference' (i.e. separate negotiating structures for these professional groups) was the 'genuine material factor' (as it was then called) which explained the pay difference.

The tribunal accepted that the collective bargaining difference was the material factor as there was no direct discrimination in regard to access to these professions or the negotiating processes. But statistical evidence had revealed a 'sex-taint' in the form of adverse impact on women i.e. indirect discrimination. The higher grades of the comparator professions comprised a greater proportion of men than women, whereas senior speech therapists were nearly all women. The ECJ agreed this was *prima facie* sex discrimination. Applying the Article 119 test (now Article 157) there was not sufficient objective justification for the difference in pay. (The ECJ remitted the question of whether the employer could justify the pay difference on the ground of market forces to the national court.)

The ECJ judgment in *Enderby* made it clear that the statistical approach could be used in equal pay cases despite there being no employer's 'provision, criterion or practice' involved – an approach that has since been applied by the UK courts and written into the equality of terms provisions of the EqA 2010.

The Grundy case

A more recent case concerning collective bargaining and objective justification is *British Airways plc v Grundy (No. 2)* (2008 IRLR 815, CA). The claimant had, for a period of time, been on a Support Cabin Crew (SCC) contract which enabled her to work part-time. When the SCC terms and conditions had first been negotiated (in the late 1980s), it had been collectively agreed that staff on SCC contracts would not receive pay increments as apparently this would be regarded as disadvantaging full-time cabin crew. When the SCC scheme was wound up in 2002, the claimant was given a part-time 'Cabin Crew' contract and placed on BA's incremental pay scale. However, owing to having been on a SCC contract, she was credited with only five years continuous service. Her equal pay claim cited as her comparator, a male part-time cabin crew member with whom she was doing like work. He had never been on a SCC contract and was paid significantly more.

The tribunal found (upheld by the Court of Appeal) that the difference for the pay disparity lay in the

fact that under the SCC contract, cabin crew were not entitled to pay increments and that this had a disparate impact on women. The Court of Appeal rejected BA's argument that the fact that the terms and conditions had been agreed through collective bargaining constituted objective justification. It was accepted that in the cut and thrust of negotiations, one group could do better than another but in this case the purpose of the parties was to set less favourable terms for the SCC staff (who were predominantly female). Consequently, the SCC collective agreement could not amount to objective justification.

The *Grundy* case highlights the need for union representatives (as well as employers) to be aware that in trying to balance the conflicting interests of groups of employees (and union members) in negotiating a collective agreement, there could be a risk of an adverse impact on one sex or another group with a protected characteristic.

Union intransigence is not a material factor

Union intransigence will not be accepted by the tribunal as a material factor defence to an equal pay claim (*Coventry City Council v Nicholls* 2009 IRLR 345 EAT).

In the *Nicholls* case, the unions and employer were unable to reach agreement on implementing the results of the JE exercise and ultimately the employer imposed the single status arrangements. A group of female claimants claimed equal pay with refuse collectors. The Council argued that even if the original cause of the pay difference had been sex tainted this had been overtaken by union intransigence. The EAT held that the union position did not negate sex as the cause of the pay difference. In effect, the so-called material factor amounted to a plea of mitigation on the part of the Council for not doing what it ought to have done. The EAT was of the view that ultimately the remedy to unequal pay was always in the employer's hands.

Can the union held legally responsible for a breach of the sex equality clause?

The union cannot be held liable on its own or with the employer for a breach of the contractual sex equality clause, including where the less favourable treatment stems from collective agreement provisions which have been incorporated into (i.e. become part of) employees' contracts of employment.

However, the Equality Act 2010 (s.57) has provisions applying to unions and (as explained later) collective agreements. The union must not discriminate against a person who is protected under the Act in the way it 'affords access to opportunities for receiving a...service' or subject the person to any (other) detriment or victimise a member. (See the supplement for more information.)

In relation to local grading and pay reviews, it is very important that in explaining and advising on final offers and/or proposals to settle equal pay claims, union representatives take care to ensure that their actions (or inaction) do not directly or indirectly discriminate against any group of members who are protected by the provisions of the EqA 2010. (Further guidance is available from your union head office).

Historical reasons for pay differences

An historical explanation for the pay difference can be put forward by the employer as a material factor defence. The tribunal has to decide if that explanation is 'material' (i.e. significant and relevant) at the time the equal pay complaint is made.

In *Glasgow City Council and ors v Marshall and ors* (2000 IRLR 196, HL), teachers and instructors in special schools had originally been paid according to separate nationally negotiated pay scales - a material factor that explained the pay difference. An example of a local authority case where the employer's defence of the historic payment of bonus to (mainly) male workers succeeded is *Paterson v the London Borough of Islington and ors* EAT 0347/03. It was found that the performance requirements deriving from bonus scheme were still 'material' thirty years later.

Even if a historical factor is material, if there is a taint of (indirect) sex discrimination, the employer will have to objectively justify the pay difference. On this basis, local authority employers have lost equal pay cases concerning bonus where they were unable to show that, many years after the introduction of the bonus schemes, the payment of bonuses to the men was (at the time the claims were lodged) a proportionate means of meeting a legitimate aim. Over time, the link between productivity and the payment of bonuses had been severed (*Hartlepool Borough Council v Dolphin and ors* 2009 IRLR 168 EAT; and the cases of *Bury Metropolitan Borough Council v Hamilton and ors* and *Sunderland City Council v Brennan and ors* 2011 IRLR 358 EAT).

The next section looks briefly at the protection that the law provides for employees who exercise their right to equal pay.

How are employees seeking equal pay protected from retaliation by the employer?

The support of the union representative is the first line of defence in protecting union members from being victimised by an employer for pursuing their rights. The law can help: on equality issues (including equal pay), the EqA 2010 protects an employee who treated detrimentally because of a 'protected act'.

‘Protected act’ is defined broadly – it includes bringing proceedings under the EqA, giving evidence and ‘doing any other thing for the purposes of or in connection with the EqA’. (The employee does not have to show that that her treatment was less favourable than that of a comparator who had not done a protected act.) The Act also sets out the circumstances in which employers are prohibited from victimising employees.

What is detriment?

‘Detriment’ can take many forms from general hostility to dismissal. Lord Hope noted in *St. Helens Metropolitan Borough Council and ors v Derbyshire and ors* (2007 ICR 841, HL) that ‘fear of public odium or the reproaches of colleagues is just as likely to deter an employee from enforcing her claim as a direct threat’. In this case, the claimants (school meals workers) had not accepted the deal on offer to settle their equal pay claims (unlike most of the catering staff). Two months before the tribunal hearing, the employer wrote a letter to the claimants stating that the authority could not withstand any immediate increases in pay rates. The employer also wrote to all the catering staff commenting on the costs of a successful claim and the viability of the service. It would be forced to consider ceasing the service, providing free school meals only – thus requiring ‘a very small proportion of the existing workforce’. The claimants alleged they had been victimised – the letters had caused them distress and some of them had been reproached by other catering staff. They argued that the employer’s intention was to intimidate them into dropping their equal pay claims. The House of Lords agreed.

It is important to note that the EqA 2010 provisions on victimisation in employment are not restricted to the actions of employers – they also apply to trade unions (see the supplement).

What could happen if a collective agreement is discriminatory?

What happens if it is found that a term in a collective agreement is discriminatory?

An employee who is or could be discriminated against by the term can complain to the tribunal. If the tribunal finds the complaint to be well founded, it must make an order declaring that the term is ‘void’. This means it has no effect. But the tribunal cannot modify it or put another term in its place – that has to be done by negotiation between the union and the employer.

If, hypothetically, an employee challenged a term in a collective agreement concerning their grading and pay, the consequences of that term being declared void could be very serious. Besides reputational

damage to the union, the agreement itself could unravel.

While they are rare, such challenges highlight the importance of carrying out equality impact assessment (EIA) of proposed pay and grading packages.

(For more information on this topic – see the supplement.)

What happens if negotiations over grading and pay fail?

The Red and Green Books and joint advice set out dispute resolution procedures to be followed if negotiations break down.

Advice should be taken from the regional office when industrial action is being contemplated. (Please also see your union’s procedures for authorising industrial action.)

Legal action in support of the union’s negotiating position must be formally approved (please see your union’s procedures). This requirement also applies to taking a claim on behalf of an individual member or multiple claims.

Pay discrimination and protected characteristics (other than sex) ²⁰

In next sections of the Guide cover:

- Pregnancy and maternity leave and pay equality
- Pay equality and protected characteristics (other than sex)
- Equal pay audits and protected characteristics (other than sex)

Pregnancy and maternity leave and pay equality

The *ECHR Code of Practice on Equal Pay* (2011) explains the provisions in the EqA 2010 relating to pregnancy, maternity leave and equal pay. (Pregnancy/maternity are protected characteristics.)

Although a woman on maternity leave has no right under equal pay legislation to receive full pay, the EqA 2010 entitles her to some specific protection in relation to pay while she is absent from work. The basic principle is that a woman should not receive lower pay or inferior contractual terms for a reason relating to her pregnancy or maternity leave and a ‘maternity equality clause’ is implied into her contract of employment to ensure this. She does not need to show equal work with a comparator in this situation.

The maternity equality clause applies to:

- the calculation of contractual maternity-related pay
- bonus payments during maternity leave, and
- pay increases following maternity leave
- Maternity leave includes compulsory, ordinary and additional maternity leave.

‘Maternity-related pay’ means pay other than statutory maternity pay.

During maternity leave, a woman’s entitlement to her usual contractual remuneration (salary, car allowances, etc) stops unless her contract provides for maternity-related pay. However, she is entitled to any pay rise or contractual bonus payment awarded or that would have been awarded to her had she not been on maternity leave. (The Code gives an example to illustrate what this means in practice, at paragraph 96.) On her return to work a woman should receive any pay increases which would have been paid had she not been on maternity leave.

Member’s queries or complaints in relation to maternity leave/ parental leave and pay can involve complicated legal issues so union representatives should seek legal advice if necessary.

Guidance on pregnancy and maternity, employment rights for pregnant women, and pay and conditions during maternity leave is set out in the *EHRC Code of Practice on Employment (2011)*.

Note: The position in relation to statutory shared parental pay (birth and adoption) is covered by the Statutory Shared Parental Pay (General) Regulations 2014.

Pay equality and protected characteristics (other than sex)

The ‘equality of terms’ (equal pay) provisions of the EqA 2010 apply only to the protected characteristic of sex, however the principles of direct and indirect discrimination apply to the other protected characteristics, as explained below.

Paying an employee more or less than an actual or hypothetical comparator because of the protected characteristic of disability, gender reassignment, marital or civil partnership, race, religion or belief, or sexual orientation will amount to direct discrimination.

Age discrimination

Direct discrimination by an employer in respect of an age-related pay practice can be defended if it can be shown that it is a proportionate means of achieving a legitimate aim. (Direct discrimination is prohibited in respect of every protected characteristic except age.)

In general, indirect discrimination can be defended if it is objectively justified.

See also the earlier section on length of service and age discrimination.

Indirect race discrimination

To establish a disparity in pay, a claimant has to establish that he or she has been treated less favourably than a comparator who does not share the protected characteristic of the claimant. For example, in the case of *Wakeman and ors v Quick Corporation and anor* (1999 IRLR 424, CA), the claimants were British employees working for a Japanese bank who argued that their treatment was less favourable than colleagues who were seconded from Japan. (It was held that that the claimants were not paid substantially less on a racial ground but because of the fact of the comparators’ secondment.)

Religion or belief – indirect discrimination

In the case of *Naeem v Secretary of State for Justice* (2015 EWCA Civ 1264), an imam who worked as a prison chaplain brought a claim of indirect religion or belief discrimination, arguing that he had been disadvantaged by the application of the length of service (LOS) criterion, which meant that the average basic pay of Muslim chaplains was lower than that of the Christian chaplains. (The case was taken under section 19 of the EqA - indirect discrimination.)

In brief, the Court of Appeal noted that the EqA is not intended to rule out all disparities but only those which are discriminatory. The reason that Muslim chaplains had on average lower basic pay was directly related to their shorter average service (than Christian chaplains) which in turn was due to an objective, non-discriminatory factor. Prior to 2002, the Prison Service had not employed any Muslim chaplains. Given the tribunal’s finding that the non-recruitment of Muslim chaplains prior to this date was non-discriminatory, it was not open to the tribunal to find that the LOS criterion placed Muslim chaplains at a particular disadvantage. (At the time of writing, it was understood that the claimant was seeking to appeal to the Supreme Court.)

The Court of Appeal said that *Naeem* was different from the equal pay cases of *Cadman v Health and Safety Executive* (2005 ICR 1546 CA; ECJ 2006 ICR 1623) and *Wilson v Health and Safety Executive* (2010 ICR 302 CA) in which female health and safety inspectors had complained that their average pay was less than the average pay of male inspectors because they had, on average, shorter service. In those cases, the LOS criterion had a built-in tendency to put women at a disadvantage because women were liable to start their careers

later than men or take career breaks because of childcare responsibilities.

Disability and performance-related pay

In relation to performance-related pay, if a worker has a disability which adversely affects their rate of output, and the effect may be that they receive less pay than other workers, the *EHRC Code of Practice on Employment (2011)* advises that the employer must consider whether there are reasonable adjustments which would overcome this substantial disadvantage (paragraph 14.8).

Note: The EqA 2010 has provisions on disability discrimination that do not apply to other protected characteristics. These are outside the scope of this Guide – please refer to other sources of union guidance.

Equal pay audits – protected characteristics (other than sex)

Deciding on the scope of an equal pay audit

The EHRC advises that although its guidance on equal pay auditing focuses on sex, the methods used to identify sex discrimination can also be used to identify and put right pay discrimination on other grounds (*ECHR Code of Practice on Equal Pay 2011*).

In deciding the scope of an equal pay audit (EPA), a key consideration is the extent and quality of the employer's data on pay and groups of employees broken down by protected characteristic. Sex (and part/full-time status) should not be a problem for local government organisations. In relation to including ethnicity, disability and age, the *EHRC Data required checklist* (available online) states:

- **Ethnicity:** You will need to consider whether you intend to analyse the pay of different ethnic groups, or whether you will analyse the pay of black and minority ethnic employees as a group, compared with white employees. Much will depend on the ethnic composition of your workforce and the quality of your data.
- **Disability indicator:** As with ethnicity, you will need to consider whether you intend to analyse the pay of employees with different types of disability (if you collect this data), or whether you will analyse the pay of disabled staff as a group, compared with non-disabled. Much will depend on the number of disabled employees in your workforce and the quality of your data.
- **Date of birth:** Used for analysing pay by age.

Union representatives should take an active part in discussions with the employer on the scope of the audit.

The benefit of extending EPAs beyond sex is that auditing may show that certain (on the face of it) neutral pay policies and/or practices are having an adverse impact on a particular group. The results can be very powerful in negotiating with employers, particularly if they are unaware of, or in denial about, pay inequalities which may be occurring in relation to one or more protected characteristics.

Any significant difference in the pay of one protected group compared with groups not sharing that characteristic should be investigated so that the cause of it can be identified and addressed, as appropriate. (For more information, see the Part 1 guidance on EIAs and EPAs.)

The same advice applies to equality impact assessment.

What might signal disparate impact in regard to race?

Examples of evidence of disparate impact in regard to the protected characteristic of race could include the following:

- Jobs held by BAME employees from a particular group (or groups) score similarly to jobs held by white employees but fall disproportionately just below the grade boundary line while jobs occupied by white employees are clustered just above it in the higher grade
- BAME employees are assimilated to lower pay points in the same grade as white colleagues whose jobs scored similarly
- Access to off-spine payments (i.e. additions to basic pay) is not open to the same extent for employees from a BAME group (or groups) compared with others (not members of that group) in the same situation, for example where the jobs have the same features and requirements.
- Employees from a BAME group (or groups) consistently score lower performance ratings and are awarded lower performance-related pay (PRP) than white colleagues in the same grades and/or across the pay structure.

None of the above situations could be challenged using the EqA equality of terms provisions because they do not relate to sex – they would need to be pursued as discrimination claims as explained earlier.

The results of an EPA could show that adverse impact affects groups of employees with more than one protected characteristic, such as BAME women, or disabled young workers. The results of a basic statistical analysis may suffice in order to investigate and identify the pay policies, practices or criteria that are causing the adverse impact; but if negotiation fails to resolve the issues, legal advice should be sought on the options, including the statistical evidence that would be needed to

support claims. (See the supplement for more information)

Can an employer be ordered to conduct an equal pay audit?

Many local government organisations will have equality policies or plans which commit them to carrying out periodic EPAs, although there can be slippage and non-compliance.

There are strong arguments why it is in the employer's best interest to carry out regular EPAs (for reasons mentioned earlier in the Guide). Of course, not all employers will be persuaded but an employer has to lose an equal pay case before the tribunal can order an EPA. Even then, there are get-outs for the employer. Nevertheless, it may be worthwhile tactically to warn an uncooperative employer that if claims were lodged, your union would seek an EPA order if they succeed.

Where the tribunal finds that there has been an equal pay breach, it must order the employer (the respondent) to carry out an equal pay audit unless these circumstances apply:

- The information which would be required to complete an audit is already available from an audit which has been completed by the employer in the previous three years;
- It is clear (without an audit) whether any action is required to avoid continuing or future equal pay breaches
- The breach gives the tribunal no reason to think there may be other breaches; or
- The disadvantages of an audit would outweigh its benefits

If any of these circumstances apply, the tribunal must not order an audit (EqA 2010 (Equal Pay Audits) Regulations 2014, s.3).

Accessing data for local grading and pay reviews

Employers will need to share pay and related data with union representatives in carrying out local grading and pay reviews, equality impact assessments and equal pay audits. There may also be occasions when you need access to information to represent an individual member (or groups of members).

As discussed in Part 1 of the Guide, local grading and pay reviews should be undertaken on a joint basis, and given the SJC/NJC principles on openness, recognised union representatives should not encounter major problems with employers refusing to share or allow access to pay data. But experience shows this is not always the case.

What is pay transparency?

In general, local authorities have transparent pay structures, but this may not be the case with other types of organisations operating in local government. Even with SJC/NJC employers, the extent of transparency can vary depending on which JE scheme is used. For example, there is nothing secret about the factor plan and weightings of the NJC, SJC and GLPC JE schemes but some employers use JE schemes that do not fully disclose how they assess the value of jobs.

'Transparency' means that pay and benefit systems used by employers should be capable of being understood by their employees and union representatives. It should be clear to individuals how each element of their pay contributes to their total earnings in a pay period.

Pay systems that are not transparent are particularly at risk of being found to be discriminatory (*Handels og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* 1989 IRLR 532, ECJ).

Ways to access pay and employment-related data

The following sections outline some of the key routes to accessing data for grading and pay reviews and highlight some of the issues raised:

- ECHRC guidance
- Pay policy statements (England and Wales)
- Data protection issues
- Disclosure of information for collective bargaining purposes
- Freedom of information requests.

EHRC guidance

The ECHR Code of Practice on Equal Pay (2011) has sections on 'Discussing equal pay issues with colleagues or trade union representatives' and 'Equal pay – obtaining information' which explain the provisions of the EqA 2010 on these topics. The former section discusses the limits to the enforceability of pay secrecy and employer's gagging clauses. (These limits apply in respect of all protected characteristics not just sex.) Much of the latter section is now redundant owing to the abolition of statutory questionnaires²¹ but this does not prevent a person who believes she is not receiving equal pay from writing to her employer to seek information that will help establish if this is the case, with the assistance of her trade union. She can use the Freedom of Information Act 2000 and (in relation to her own data) the Data Protection Act 1998 for this purpose (see below). It is also open to her to use the organisation's grievance procedure. If the matter cannot be resolved satisfactorily and an equal pay or discrimination claim is made to the

tribunal, either party (the claimant or the respondent –the employer) can ask for additional information, as can the tribunal itself. The rules governing the disclosure and inspection of documents are set out in the Employment Tribunal Rules of Procedure. (For more information, please refer to other union guidance.)

Pay policy statements (England and Wales)

Local authorities' pay policy statements can be a useful source of information.

It is a requirement under the Localism Act 2011 that local authorities and fire and rescue authorities prepare pay policy statements. (See the Act for the full list.) These statements must set out an authority's policies on a range of issues relating to the pay of its workforce, particularly its senior staff (or 'chief officers') and its lowest paid employees. Pay policy statements must be prepared for each financial year, beginning with 2012/13.

The provisions in the Act do not apply to the staff of local authority schools.

Pay policy statements can be accessed online.

Data protection and local grading and pay reviews

Employers must comply with the provisions of the Data Protection Act 1998 (DPA). To help employers meet the legal requirements, they should follow the guidance set out in the *Information Commissioner: Data Protection: Employment Protection Code* (2011), particularly *Part 2: Employment Records and Good Practice Recommendations*.

Under the DPA, an individual's pay is 'personal data'. Personal data can only be disclosed in accordance with data protection principles. Information about a worker's ethnic origin, disability, religion or sexual orientation, or health is 'sensitive data' subject to special safeguards.

In negotiating over grading and pay, employers could have concerns about sharing pay data with union negotiators on the basis that it is confidential. Some employers might use 'confidentiality' as a reason to withhold data from union negotiators. While care must be taken in regard to data protection, there are two key points to be made in response: firstly, the employer will have gained employees' consent for the lawful processing of their personal data. Secondly, personal data is not required for JE quality assurance purposes, pay modelling, or for EIAs or EPAs – the data should be anonymised. (If the employer has not anonymised the data, you should insist that this is done and not process or circulate any personal data that you are given access to by accident. This can happen, for example, when a payroll administrator neglects to

delete personal data columns from a spreadsheet before sending it to you.)

Using anonymised data, individuals could still be identified, for example, where there are a very small number of employees in a particular grade or doing a particular job or in receipt of a particular payment. This should be taken into account in agreeing how outcomes (of JE exercises, etc) will be reported.

For a grading and pay review, union representatives should agree a protocol on data management with the employer.

During the local grading and pay review, data protection issues will need to be addressed at a number of stages including:

- gathering and analysing job information from job-holders
- recording and processing information on evaluations of jobs
- disclosure of scores on provisional evaluations/ job matching
- carrying out equality impact assessment on the proposed pay structure and any proposed changes to conditions
- deciding what information to put out to job holders on the proposed package for consultation
- arrangements for notifying individual employees of their new grade and pay point, assimilation arrangements and any new terms and conditions
- arrangements for appeals including access to information about comparator's JE score and remuneration
- arrangements for publishing information on the outcomes and monitoring of the local review

Advice on data protection and EPAs is available from the EHRC online checklists.

Under the Equality Act 2010, an employer's rule or contractual 'gagging clause' to stop individual employees from disclosing their pay or seeking information about a colleague's pay is unenforceable if the disclosure is made in order to find out 'to what extent there is a connection between pay and having (or not having) a protected characteristic' (section 77).

Disclosure of information to trade unions for collective bargaining purposes

If the branch meets a brick wall in getting necessary information from an employer in order to negotiate over a grading and pay review, one route to consider is to request disclosure of information using the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992, section 181.

Information on this is set out in the *ACAS Code of Practice 2: Disclosure of Information to Trade Unions for Collective Bargaining Purposes* (1998).

The *Code* gives examples of information which 'could be relevant for collective bargaining purposes' under the heading, pay and benefits: 'principles and structure of payment systems; job evaluation systems and grading criteria; earnings and hours analysed according to work-group, grade, plant, sex, out-workers and home-workers, department or division, giving, where appropriate, distributions and make-up of pay showing any additions to basic rate or salary; total pay bill; details of fringe benefits and non-wage labour costs' (paragraph 11). The other criteria are conditions of service, manpower, performance and financial information.

See the supplement for more information.

Freedom of Information (FOI) requests

Another route to get information held by public authorities is by making a freedom of information request.

The Freedom of Information Act 2000 (FOIA) provides public access to information held by public authorities.

The Act covers any recorded information that is held by a public authority in England, Wales and Northern Ireland, and by UK-wide public authorities based in Scotland. Information held by Scottish public authorities is covered by the Freedom of Information (Scotland) Act 2002.

Public authorities include government departments, local authorities, the NHS, state schools and police forces. However, the Act does not necessarily cover every organisation that receives public money. For example, it does not cover some charities that receive grants and certain private sector organisations that perform public functions. (A list of public authorities is included in the Schedules to the Acts.)

In addition to the bodies listed in the Act, the definition of a public authority also covers companies which are wholly owned:

- by the Crown
- by the wider public sector; or
- by both the Crown and the wider public sector.

A company that is wholly owned by a local authority (or a number of local authorities) is a 'public authority' for the purposes of the FOIA 2000. This would cover, for example, an arms-length organisations (ALMO) set up as a private company wholly owned by the authority to which it has transferred responsibility for social housing services.

The public authority is not always obliged to provide the information requested. A request for information can be refused when:

- It would cost too much or take too much staff time to deal with the request
- The request is vexatious
- The request repeats a previous request from the same person

The Act also sets out exemptions that allow a public authority to withhold information from a requester, for example, if disclosure would be likely to prejudice someone's commercial interests. There is also an exemption for personal data if releasing it would be contrary to the Data Protection Act.

There is no fee payable for making a FOI request but a public authority can charge for 'communication costs' involved in providing the information. (This does not include staff time.)

Are there examples of successful FOI requests?

The supplement outlines two FOI cases where the Information Commissioner's decisions were upheld and the requesters succeeded: *South Lanarkshire Council v Scottish Information Commissioner* (a judgment of the Supreme Court) and *Huntingdonshire District Council v the Information Commissioner* (decided by the Regulatory Tribunal).

Both cases are relevant to local pay and grading reviews. In the *South Lanarkshire Council* case, the Council failed in arguing that disclosure of data requested about the number of employees on particular pay points contravened the Data Protection Act. In the *Huntingdonshire District Council* case, the Council was unsuccessful in arguing that commercially confidential aspects of the JE scheme it used prevented the disclosure of information about the JE outcomes which had been requested.

Local pay and grading reviews: the Public Sector Equality Duty

At the time of writing, the Public Sector Equality Duty (PSED) was due to undergo a formal evaluation (please check for updates).

Currently, the general equality duty (GED) applies in Great Britain to public authorities and bodies who are not public authorities but who carry out public functions. The GED requires these organisations to have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act
- (b) advance equality of opportunity between

persons who share a relevant protected characteristic and persons who do not share it

- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(Equality Act 2010, section 149)

In addition to the GED, there are specific duties. These differ in England, Scotland and Wales.

The supplement lists the specific duties that might be relevant to carrying out EIAs and EPAs, particularly where they could be useful to union representatives as levers in dealing with employers who are resistant to carrying them out or to addressing pay inequality through action planning.

Union representatives in Scotland and Wales should check if gender pay information is being sought, whether it might have to be reported be under the Public Sector Equality Duty. (For example, in Scotland and Wales, public sector employers with over 150 employees are required to report their gender pay gap.)

For brief information on equality schemes in Northern Ireland, see the supplement.

Resources List

NJC Green Book (2016 edition)

Includes updated Part 4 guidance on:

- NJC job evaluation scheme
- pay and grading reviews
- equal pay audits
- equality impact assessments
- work/life balance
- workforce development

References

All available online unless starred (*)

ACAS (1998) *Code of Practice 2: Disclosure of information to trade unions for collective bargaining purposes*.

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Equality and Human Rights Commission (2011) *Code of Practice on Equal Pay*.

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Information Commissioner (2011) *Information Commissioner: Data Protection: Employment Protection Code (2011)*

Local Government Association (2012, February) *Strengthening the Strategic Approach to Pay and Rewards: A resource guide for local government*.

Local Government Association (2013, September) *Pay Progression in Local Government: Survey report, Commentary and Advice*.

Local Government Association (2014, January) *Local Government Earnings Survey Summary 2014/15*.

Local Government Association (2015, March) *Local Government Workforce Survey 2013/14*.

Local Government Association (2016, March) *Local Government Workforce Survey 2014/15*.

Office for National Statistics (2016, First Quarter) *ONS Quarterly Public Sector Employment Survey*.

* Not available online or online free of charge

Websites

GMB

www.gmb.org.uk

UNISON

www.unison.org.uk

Unite

www.unitetheunion.org

Local Government Association –

www.local.gov.uk

(website includes comprehensive list of NJC job evaluation documents including technical notes. Administers the NJC Associate Consultancy Scheme on behalf of the NJC)

ResourceLink pay modeling software –

www.rewardsupport.northgatearinso.com

Equality and Human Rights Commission -

www.equalityhumanrights.com

(website includes comprehensive guidance on Public Sector Equality Duties and how to implement and achieve equal pay proof pay systems)

ACAS

www.acas.org.uk

Office for National Statistics

www.ons.gov.uk

Footnotes

1. The ECJ is now called the Court of Justice of the European Union. The Guide uses the abbreviation 'ECJ' for both.
2. Case law is 'judge-made law' i.e. law that is based on decisions made by judges (in employment cases, above the level of the employment tribunal (ET). See the supplement for more information).
3. Equality Act 2010, section 64(1)(a) and section 65(1).
4. So did the Race Relations Act 1976 and the Disability Discrimination Act 1995.
5. This is the reference to the 'leading case' i.e. the judgment that should be followed by tribunals and other courts in similar cases. In the Guide, where a leading case or key judgment is mentioned, it is followed by a case reference. This tells you which court made the ruling (in this case, the House of Lords), the year of the judgment and where the case was reported. (See the glossary for explanations of the abbreviations used.)
6. Section 83(2)(a). The EqA definition of 'employment' is wider than that in the Employment Rights Act 1996 (covering rights such as unfair dismissal).
7. The two forms of discrimination' – direct and indirect – are defined in s.13 and s.19 respectively.
8. Agenda for Change refers to the NHS national agreement and processes to modernise pay structures and bring in single status for most groups of staff. Grading and pay is based on equal-value based JE – using a JE scheme designed and agreed by the employer and unions for this purpose.
9. Litigation means legal action e.g. taking making a claim to the employment tribunal.
10. In the EAT, the case was called Fox Cross Claimants v Glasgow City Council.
11. The EqA 2010 replaced 'otherwise unsuitable to be relied upon' with 'otherwise unreliable' – it means the same thing – the EqA wording is simpler.
12. The Hartley judgment is not binding on other tribunals and courts because it is a tribunal judgment (explained in the supplement). However, Hartley was not appealed. It has also been cited in judgments of the EAT.
13. A settlement followed the listing of an appeal to the EAT on the validity of the '555' JES being used by the employer.
14. This Guide does not go into detail on indirect discrimination. The EHRC Code of Practice on Employment (2011) is a useful source of information.
15. The wording of the EqA s.69 is different from the previous legislation but it remains to be seen what difference this may make to future judgments in equal pay cases.
16. This would also apply to contribution-related pay and performance-related pay.
17. Measured on a full-time equivalent (FTE) basis.
18. Prima facie means 'on the face of it'. It refers to evidence in favour of the claimant that is sufficient to call for an answer from the respondent (the employer).
19. 'Multiple claims' involve two or more members where the claims are based on the same set of facts.
20. 'Other than sex' – this is not to imply that other protected characteristics under the EqA 2010 are less important - it reflects the different way in which the law treats sex-related pay inequality from other causes of pay discrimination.
21. Prior to 2014, an employee who believed she (or he) may be receiving unequal pay or experiencing discrimination could issue a questionnaire to the employer – the form was set out in a statutory regulation.



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